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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 633.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Clarence Higgins, by Grace
Higgins, Conservator,
Defendant in Error,

vs.

Midland Casualty Company,
Plaintiff in Error.

Error to Winnebago.

219 I.A. 633

Opinion by DILLON, P. J.

It is claimed by plaintiff that while he was acting as policeman on the streets of the City of Rockford on June 4, 1913, he suffered a sunstroke and thereby became disabled from work and afterwards insane therefrom, and that thereby a liability was created under an accident insurance policy issued to him by defendant on June 30, 1912. Through his conservator he brought this suit. The trial court directed a verdict for defendant, from which plaintiff appealed to this court, and we affirmed the judgment in Higgins v. Midland Casualty Co., 206 Ill. App. 150. The supreme court reversed the judgment in Higgins v. Midland Casualty Co., 281 Ill. 431, and remanded the cause to the circuit court. There another trial was had and plaintiff had a verdict and a judgment for \$2,000, from which defendant prosecutes this writ of error.

Defendant filed a plea of non-assumpsit and for special pleas. The first special plea is that plaintiff was not continuously unable to perform any of his business duties, as the declaration alleged and the policy

required to create a liability. The second special plea denied that plaintiff gave defendant a notice as soon as possible, as the policy required. The third special plea was that by the statement signed by plaintiff and attached to the policy he warranted that his habits of life were correct and that he was in sound condition, mentally and physically, whereas his habits of life were not then correct and temperate and he was not then in sound condition, mentally and physically, but he was at the time the policy was issued and had been for a long space of time addicted to the excessive use of intoxicating liquor and to other excesses, of which defendant had no knowledge. The fourth special plea alleged that plaintiff had received medical treatment contrary to his warranty, etc. Plaintiff filed replications to said pleas on February 26, 1916, and on the same day a demurrer was filed to said replications. So far as we can ascertain in this record that demurrer was never acted on nor was leave asked to file other replications, but on February 26, 1916, plaintiff filed six other replications, which we assume was an abandonment of the previous replications. The first was a similiter to the general issue. The second was to the first special plea and alleged that plaintiff was continuously unable to perform his business duties. The third replication was to the second special plea and alleged that notice was given by the conservator as soon as possible and set up the facts excusing the temporary delay. The fourth replication was to the third special plea and alleged that plaintiff was of temperate habits and was in sound condition mentally and physically and not

affected with the disease therein specified. The fifth replication was to the fourth special plea and traversed its allegations and averred the plaintiff was not ill of the diseases therein specified. The sixth replication was to all the pleas and set up at great length the payment by the conservator to the authorized collector of defendant with the approval of its manager of a certain premium on said policy just before this suit was started, and with full knowledge by said collector and by said manager of all the facts set up in said pleas, and this was alleged to be a waiver of those defenses. This plea concluded with a verification and there should have been a special rejoinder thereto by defendant. No rejoinder was filed. As defendant went to trial voluntarily the case is treated as if issue had been joined orally to said plea. *Correa Court of Honor v. Barker*, 36 Ill. App. 490; *Witteran Co. v. Goole*, 200 Ill. App. 108, 114; *Butler v. Nat. Live Stock Ins. Co.*, 200 Ill. App. 280, 285, and cases there cited.

There is evidence tending to show that plaintiff was sunstruck on the day in question while in the performance of his duties as policeman, and that, although kept upon the payroll for a long time, he was so seriously affected by the sunstroke that he could not render effective services and that he finally became insane. There was evidence tending to show that he was not sunstruck, but was suffering from the effects of intoxication. There was evidence tending to show that he had been habituated to the use of intoxicating liquor at the time this policy was issued, and other evidence to the contrary. One of the pleas set up,

[illegible]

among the statements upon which this policy was issued, that plaintiff had had medical attendance. There was proof that he had been so attended once at his house and that he had visited the same physician twice at his office. The evidence is such on these questions that to support a verdict either way, the jury should have been properly instructed.

By the fifth instruction, given at the request of plaintiff, the jury were told that if Higgins suffered a sunstroke while acting as policeman and if said sunstroke was due to his exposure to the sun in the performance of his ordinary duties and if he was from that date rendered continuously unable to perform any of his business duties, and if notice was given to defendant within a reasonable time after the injury, then plaintiff was entitled to recover. This ignored the evidence tending to show that his habits of life were not correct and temperate when the policy was issued, but that he was addicted to the excessive use of intoxicating liquors, and also the evidence tending to show that his statement that he had not received medical attention was untrue. The eight instruction given at the request of plaintiff told the jury that the plaintiff was entitled to recover under the conditions therein stated, and it omitted all reference to the subjects also omitted from instruction No. 5. We find it impossible to sustain a verdict for plaintiff based on those two instructions.

Defendant complains of the refusal of five instructions requested by it. None of these instructions made any reference to the replication concerning waiver of the defence

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that he had been
visited the same day
dance in such a way
either way the jury should have been
By the fifth instruction
plaintiff, the jury
announced which was
was due to his ignorance of
ordinary duties
usually unable to
notice was given
the injury, then plaintiff
ignored the evidence
were not correct
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untrue. The
plaintiff told the jury
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all references
No. 6. As
plaintiff based
reference to the

If there is any evidence in the record fairly tending to show such a waiver, these instructions were properly refused. The record is large and the abstract is brief, and our attention is not called to any evidence in support of the replication concerning waiver. If there is no such evidence, then that matter was not required to be noticed in instructions. The first of these refused instructions was based in part upon the proposition that the jury believed from the evidence that plaintiff's habits of life were not correct. It did not give any information to the jury as to what was meant by habits of life or by the word "Correct". We think that part of the instruction should not have been given without something to inform the jury what was meant by that term. There is an instructive discussion of this subject in *Ins. Co. v. Foley*, 105 U. S. 450. The rest of the instruction was correct. The second refused instruction was to the effect that if plaintiff did suffer an stroke in some degree, still if it did not render him continuously unable to perform his business duties and he did thereafter continuously perform duties as a policeman, there could be no recovery. We think this too general. Plaintiff did perform some duties as policeman thereafter and was permitted to endeavor to do so for some considerable time, but there is evidence tending to show that he was not really competent to do this. We think the instruction was too general and was properly refused. The same suggestions apply to the third refused instruction. The fourth refused instruction was to the effect that if within seven years prior to the issuance of the policy,

is there a...
such a...
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ion was to...
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unable to perform...
continuously perform...
no recovery...
did perform some...
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The...
within... years prior...

plaintiff received medical or surgical attention from any physician or surgeon, then there could be no recovery. As already stated, plaintiff had during that period been visited once at his home by a physician and had been treated by him twice at his office. We are of the opinion that under what we said in *Paymer v. Modern Brotherhood of America*, 157 Ill. App. 510, on p. 524, this instruction was too indefinite, although it may be that the plaintiff should have had some pleading by which he denied specifically that this statement in the application was a warranty. The fifth refused instruction set out the statement contained in the application that his habits of life were correct and temperate, that he had never been subject to certain diseases and that he was in sound condition, mentally and physically, and told the jury that if plaintiff was not a person of correct and temperate habits, they must find for defendant. This instruction did not define what was meant by correct and temperate habits and was therefore faulty, as suggested with reference to refused instruction No. 1. The paragraph from the application set out in said instruction is subject to the suggestion made by us in *Turner v. Brotherhood of Am. Yeomen*, 154 Ill. App. 27, on pp. 34-36 and in *Clover v. Modern Woodmen of America*, 142 Ill. App. 278. It may be that to raise this question plaintiff should have had some pleading denying that these were warranties and setting up that they were made in good faith etc. For error in giving instructions 5 and 6, requested by plaintiff, the judgment is reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



123456789

Recd at Court 12/15

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 633

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

The People of the State of
Illinois. Defendant in error.

Max Fensky, Plaintiff in error.

219 I.A. 633

[illegible]

SECRET

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1376a)

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191.A. 633

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6814.

William Templeton, appellee

vs

Appeal from Circuit.

Grisesser Fruit & Produce Co.

Appellant.

Dillon, P. J.

219 I.A. 633

In the morning of October 21, 1911, Templeton, walking from the sidewalk to the corner of Adams Street in the city of Detroit to take a street car, was in such a hurry that he was struck by the rear of a fruit & produce company car driven by a driver who was negligent. Templeton was thrown to the ground and injured. He sued the driver of the car to recover damages for said injuries, and on a jury trial had a verdict and a judgment for \$700.00. From which he appeals. It is not claimed that the damages are excessive or that the trial judge committed any error except in denying defendant's motion for a new trial. Defendant claims that the jury did not accord a verdict that defendant was negligent, and did not require a verdict that plaintiff was guilty of contributory negligence which would bar recovery.

The proof by plaintiff tended to establish the following facts. There was in force in said city an ordinance reading as follows: "The driver of a vehicle when taking a street car shall stop, or when about to reach a spot opposite such car so as not to contribute to the injury passengers who may board or alight from such car." Plaintiff came to the corner of Adams and Oak Streets in a car going north up Adams Street. He stood on the sidewalk on the east side of Adams Street south of Oak Street, where cars were accustomed to stop for north bound passengers. It was a light after six P. M. and rainy and dark. A bus driver in the car of plaintiff, was on his way to his place of work and was in a hurry.

1940-1941

1942-1943

1944-1945

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2000-2001

and had walked that far with plaintiff and other children
 plaintiff and the other children. He then turned to go on his way
 thought of something. He then turned to go on his way
 around the plaintiff's car. He then turned to go on his way
 The car had stopped and stopped. He then turned to go on his way
 the car to stop. He then turned to go on his way
 the next, and the car had stopped. He then turned to go on his way
 Several other children had been in the car. He then turned to go on his way
 The car stopped, and the car had stopped. He then turned to go on his way
 of the car had stopped. He then turned to go on his way
 and the car had stopped. He then turned to go on his way
 back to the car. He then turned to go on his way
 miles per hour. He then turned to go on his way
 could find any evidence. He then turned to go on his way
 and the car had stopped. He then turned to go on his way
 turned to go on his way. He then turned to go on his way
 the car, and the car had stopped. He then turned to go on his way
 that plaintiff had been in the car. He then turned to go on his way
 and the car had stopped. He then turned to go on his way

Plaintiff had two children. He then turned to go on his way.
 defendant had three children. He then turned to go on his way.
 employee of defendant who is on the front seat, and the
 employee of defendant who is on the back seat. He then turned to go on his way.
 There was no one in the car. He then turned to go on his way.
 trial. Defendant contends that the jury should believe the
 witnesses because they are more credible than plaintiff. He then turned to go on his way.
 because they did not see the car. He then turned to go on his way.
 was demonstrated, and the jury should believe the witnesses.
 The jury believes plaintiff's evidence. He then turned to go on his way.
 in proof which shows that the car was not in the car.
 that was not demonstrated. He then turned to go on his way.
 the injury to plaintiff. He then turned to go on his way.

Page 1

1. Introduction

2. Objectives

3. Methodology

4. Results

5. Discussion

6. Conclusion

7. References

8. Appendix

9. Glossary

10. Acknowledgements

11. Contact Information

12. Declaration

13. Signatures

14. Date

15. Page 2

16. Page 3

17. Page 4

18. Page 5

19. Page 6

20. Page 7

21. Page 8

22. Page 9

23. Page 10

24. Page 11

25. Page 12

26. Page 13

27. Page 14

28. Page 15

29. Page 16

30. Page 17

fireman and therefore was accustomed to rapid travel. Neither he nor the other man on the front seat saw plaintiff till after he was hit. The truck was of light weight and was supplied with power appliances to stop it quickly, and the driver says he used them immediately, but the truck ran quite a long distance before it was stopped. The jury saw the witnesses and believed their testimony. The trial judge approved the verdict. He gave no grounds upon which he said that the jury should have believed defendant's witnesses instead of plaintiff's, as that entitles jury to do as they please. If the street car had been stopped by the plaintiff's driver, then it would have been the plaintiff's fault and he would have been guilty of negligence. If the truck was going at 15 miles per hour in the dark, it was a light and it was sounding a horn as it approached the street car, it was guilty of negligence. Even if the street car did not arrive at the intersection at hand and the presence of plaintiff in the street was not necessarily negligence, for the right to use the street belongs to foot passengers as well as those so traveling in vehicles. The question litigated here is purely one of fact and the verdict of the jury approved by the trial judge, is conclusive in the state of the evidence here.

The judgment is therefore affirmed.

NICHOLS, J., took no part.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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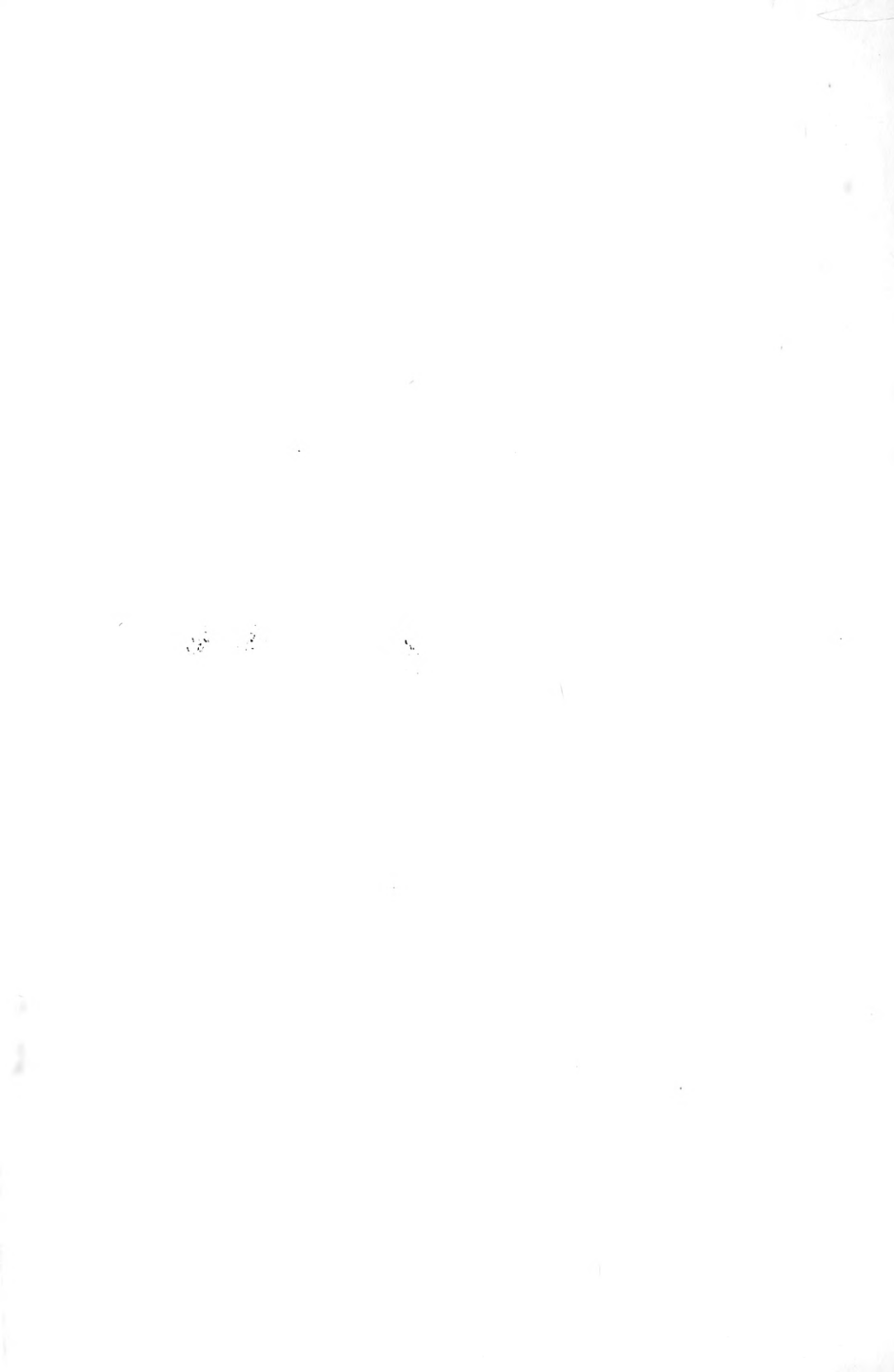
1502 POLYMER LETTERS

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



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P-H Jan 24/10

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 633

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

No. 6812.

John Dunn,)
Appellee,)
vs.)
Standard Distilling and) Appeal from Peoria.
Distributing Company,)
Appellant.)

21914.633

Opinion by HEARD, J.

Appellee brought suit against appellant for personal injuries received while in its employ and recovered a judgment for \$7,500.00, from which judgment this appeal was perfected.

One of the counts of appellee's declaration alleged that plaintiff, as an employee of Appellant was required to be in close proximity to a revolving pulley and belting so located as to be dangerous to appellee as such employee, the duty of appellant under the provisions of "An Act to provide for the health, safety and comfort of employees in factories, etc., "Approved June 29, 1915; in force July 1, 1915," properly to enclose, fence or otherwise protect said pulley and belting; the failure of the appellant to comply with said act. said count further alleges that appellee's right hand, as a result of said alleged negligence of the appellant became caught between the said revolving pulley and belting, resulting in serious permanent injuries to his right hand and arm and other parts of his body.

John Dunn,
Applicant,
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...

2191 A. 333

Applicant executed and signed a statement of his injuries received while in the service of the Government, dated September 1, 1914, in which he stated that he was injured while working for the Government at the time of the explosion at the ...

One of the ... that plaintiff, as an employee of the Government, was entitled to be in close proximity to a ... so located as to be subjected to ... the duty of ... provide for ... factories, etc. ... July 1, 1914, ... protect said ... want to comply with ... that applicant's right ... negligence of the applicant ... revolving ... want legislation ... his body.

It is claimed by appellant that the weight of the evidence shows that the accident in question was due to negligence of the defendant.

A few days prior to the accident, which occurred January 19, 1917, a new fan had been placed in the fan room of appellant's distillery. Adjoining the fan was a passageway 3½ feet wide, along the south side of the fan room. About 3 feet from the fan and on the other side of the passageway was a spiral stairway. The fan was designed for use in elevating feed and was connected with a pulley over which ran a 6-inch rubber belt driven by steam power from a counter-shaft to the main line shaft which extended through the fan room. The belt ran in an easterly direction from the fan pulley to a larger pulley on a counter-shaft. The larger pulley was to give speed to the smaller pulley on the fan, which made about 1,200 revolutions per minute. The two pulleys were 12 or 14 feet apart. This pulley and belting was not enclosed, fenced or protected as required by law. At the time of the accident appellee was engaged in throwing resin on the belt near the pulley, to keep the belt from slipping, when his right arm was caught between the belt and pulley and he was seriously injured. Had the belt and pulley been protected as required by law the accident could not have occurred and the jury were warranted in finding that appellant's failure to comply with the statute was negligence which proximately caused the accident.

It is argued by appellant that the damages awarded were excessive. That appellee was seriously injured is evidenced by the fact that for over two years he was unable to do any work during which time appellant gratuitously paid

him \$3,605.00, for his lost time. Both bones in his arm were broken and tendons cut and lacerated. He was in the hospital for six or seven weeks with his arm in a cast. The bones did not unite and he was again taken to the hospital in May 1917, his forearm laid open and plates screwed to the bones on both sides. He was in the hospital six or seven weeks at that time. In August he was taken to the hospital the third time, his arm again laid open to the bone, the plates unscrewed and taken out. Conditions of inflammation, pus and supperation were such that the result was permanent inability to straighten the elbow, and to entirely close his hand, whereby the normal use of the hand and arm was materially lessened. Necessarily he suffered great pain over an extended period. Prior to accident appellee was earning \$35.00 per week. He first commenced to work after the accident some time in May 1919. Appellant paid \$468 for hospital and physician's bills, which added to the \$3,605. heretofore mentioned and the \$7,500 verdict makes a total compensation to appellee of \$11,573. Taking into consideration all the facts and circumstances shown by the evidence we wouldnt be justified in saying that the damages awarded by the jury were excessive.

We now come to the most serious question raised upon this appeal which is that the court erred in not granting a new trial on account of improper argument of appellee's counsel to the jury.

It is unquestionably a matter of fundamental importance in the administration of justice that every litigant is entitled to have the jury determine the facts in his case from the evidence in the case, uninfluenced by an other

him \$2,000.00, or 10% of the total amount.

There were no other witnesses.

He was hospitalized for six days.

The hospital bill was \$1,000.00.

He was hospitalized in New York.

He was removed to the home.

He was taken to the hospital.

He was taken to the hospital.

He was taken to the hospital.

Conditions of the hospital.

That the result was permanent.

And to the extent of the injury.

Of the hand and the arm.

He suffered great pain.

To accident relief.

He commenced to work.

Applicant said \$400.00.

Added to the \$2,000.00.

Verdict makes \$2,400.00.

Taking into account.

Shown by the evidence.

That the injury was permanent.

As the result of the injury.

This was the result of the injury.

New trial or not.

Counsel for the plaintiff.

In the case of the plaintiff.

Entitled to the full amount.

From the evidence.

consideration . In Bishop v. Chicago Junction Ry. Co. 289 Ill. 63, it was said: "If courts of law are to be sources of justice, the rule that parties litigant, regardless of who they may be, shall have secured to them the opportunity to have the issues of their case tried by a jury free from the prejudicial influence of the improper conduct of counsel, must be strictly enforced." The rule thus laid down was followed by us in the recent case of Bromley v. Peoria Ry. Co., opinion filed March 9, 1920, where we reversed a close case solely on the remarks of Counsel.

It is not every case of misconduct of counsel, however, which will require a reversal. Where the liability is clear and the verdict is not excessive the matter is one which should be left largely to the sound discretion of the trial judge and every reasonable presumption will be indulged from his sanction that no misconduct of counsel materially prejudiced the opposite party, unless such misconduct and its prejudicial nature are clearly shown by the record.

N. C. S. Ry. Co. v. Cotton, 140 Ill. 486; C. C. Ry. v. Creech, 207 Ill. 400; Deal v. Heilegenstein, 244 Ill. 239; Appel v. C. C. Ry. Co., 259 Ill. 561; Collins v. Sanitary Dist, 270 Ill. 109.

In the present case the arguments to the jury were not taken by the court reporter and the connection in which the remarks complained of, were made is not shown. Standing alone without the context they are mostly meaningless.

While the remarks were undignified, improper and strongly to be condemned, objection was sustained in each case of which complaint was made. The trial judge who heard the remarks

and knew the connection in which they were made refused to grant a new trial on account thereof and we cannot say that the prejudicial nature of Counsel's misconduct is so clearly shown by the record as to require a reversal.
The judgment is affirmed.

consent, in fact, to the reversal of the judgment. The court in the case of *United States v. Smith*, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910,

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

A - 74 B - 1000

10082

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

*Anteriori
denied*

219 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6589.

Northampton, Mass.

Sept. 1896

Mr.

A. C. C. C. C. C.

William Lloyd, Esq.

Dear Sir,

219 I.A. 634

I have the honor to acknowledge the receipt of your letter of the 14th inst.

and in reply to inform you that the same has been forwarded to the proper authorities.

I am, Sir, very respectfully, your obedient servant.

Very truly yours,

Wm. Lloyd Lloyd, Esq.

I have the honor to acknowledge the receipt of your letter of the 14th inst. and in reply to inform you that the same has been forwarded to the proper authorities. I am, Sir, very respectfully, your obedient servant.

I have the honor to acknowledge the receipt of your letter of the 14th inst. and in reply to inform you that the same has been forwarded to the proper authorities. I am, Sir, very respectfully, your obedient servant.

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I have the honor to acknowledge the receipt of your letter of the 14th inst. and in reply to inform you that the same has been forwarded to the proper authorities. I am, Sir, very respectfully, your obedient servant.

486 1 318

Appellees brought suit against Plaintiff in breach of contract and recovered a judgment for \$100,000, from which judgment this appeal is taken.

A further content that the trial was "against the contrary to the evidence. Counsel for the state... that court believed the content in the state... which was admitted to the jury the evidence... being. Determining... of... the jury... was... 1937.

[illegible]

Best like, Principal ... stated that ...
own the rule as to the burden of proof in all cases with that
stated in Inquisit Bureau Co. v. ... Ill. or ...
and the court instructed the jury accordingly. Complaint is made
of the appellee's instruction that the jury should ...
appellee's instructions upon this subject. ... at
least five instructions in which the rule was stated as given
by the court and whether or not it was right or wrong, as applied
to the facts of this case, ... is stated as follows:
complaining with reference to the ... of ...
188 Ill. 582; McIntire v. Insurance Co. of Ill. 5-; ...
v. Hagenback, 188 Ill. 580.

Appellant's tender to the court refused his instruction No. 8, which is lengthy, involves the cost of the proffered evidence which are contained in other instructions. Appellant contends that its refusal was error because it concerned a case that the jury should not consider the question of law until they had first

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Will be advised.

1. The first part of the document is a list of the names of the persons who were present at the meeting.

2. The second part of the document is a list of the names of the persons who were absent from the meeting.

3. The third part of the document is a list of the names of the persons who were present at the meeting.

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25. The twenty-fifth part of the document is a list of the names of the persons who were present at the meeting.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

(13074)

AT A TERM OF THE APPELLATE COURT, .

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

No. 6701.

Axel Levahn, Administrator of the)

Estate of Sexton Ludwig Levahn,)

deceased,)

Appellee,)

vs.)

Appeal Boone.

Rockford and Interurban Railway)

Company,)

219 I.A. 634

Appellant.)

Opinion by NIELSEN, J.

In this case an opinion affirming the judgment of the lower court was filed at the last term; but a rehearing was granted to consider more fully the questions of error arising on the giving of certain instructions for the appellee.

The appellee Axel Levahn, Administrator of the estate of Sexton Ludwig Levahn, deceased, commenced this suit against the appellant, Rockford and Interurban Railway company, to recover damages for causing the death of said deceased. The proof shows, that the deceased on Sunday the 29th day of July, 1917, in company with two other persons, Tillie Lindroth and Anna Lindroth, took passage on appellant's railroad at Rockford, and rode out to a station in Boone county; where they spent the day in the woods. In the evening the deceased and his companions returned to take a car back to Rockford, at a crossing known as the Sweetman crossing. The Sweetman crossing, is a plank crossing; and a regular station or stopping place to take on, and discharge passengers on appellant's line. The declaration

No. 1.

AXIAL

Notes of the

December

1914

1914

Book of the

Company

Statement

219-1-384

In this case the

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Tillie Lindbergh

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avers, and the evidence tends to show, that appellant's cars stop regularly at this crossing to take on and leave off passengers; also, that cars usually signal by whistling when two to five hundred feet distance from the crossing to indicate that they are going to stop for that purpose. The deceased and the two women who were with him, reached the crossing on the evening in question about eight thirty, and were awaiting the arrival of the Rockford car, at the crossing; and the motormen noticed the people, who were standing at the crossing as the car approached. There is a conflict of evidence upon the question as to whether the usual signal was given, to indicate that the car would stop to take on passengers. The car which the appellant claims was a through car, to be followed by a local car did not stop, but ran past the crossing at a high rate of speed; and in passing struck and killed the deceased. There was a trial by jury and a verdict and judgment for the sum of \$5500.00 from which this appeal is prosecuted.

The appellee's cause of action is based upon the claim, that the deceased stood at the crossing, awaiting the approach of the appellant's car, and that under the conditions presented by the evidence he bore the relation of passenger to appellant, and that appellant was bound therefore as a matter of legal duty to exercise the highest degree of care vigilance and foresight concerning the safety of the deceased consistent with the character and mode of conveyance used in the practical operation of its road. The appellant insists, that the deceased was not in the relation of a passenger on appellant's line because he had never been accepted as such. Whether or not the deceased at the time he was killed occupied the relation of passenger forms the

main legal contention, and this question is elaborately argued on both sides. We are of opinion that if the deceased was at a station or stopping place on appellant's line, at the proper time and in the proper place, and in a proper condition to take passage on appellant's car, and was ready, willing and prepared to pay the regular fare, and was waiting there to board a car, that the relation of passenger was thereby created although the deceased had not yet been formally accepted as such by the appellant. A common carrier is bound to accept as passenger persons offering themselves at the proper time and place and in the proper manner and condition, and who are prepared, ready and willing to pay the legal fare; an acceptance of such persons by the carrier as passengers any be implied under these circumstances where it appears, that under these circumstances, ^{and} the carrier could not have made any reasonable objection to the acceptance of such persons as passengers, the acceptance will be presumed. This principle is clearly upheld in *Todd v. L. & N. Railway Co.* 107 Ill. App. 141, affirmed in 274 Ill. 201, and in *C. & N. W. Ry. Co. v. Jennings* 190 Ill. 486; *Windsor v. C. C. Ry* 177 Ill. App. 125; *I. C. R. R. Co. v. McKee's* 168 Ill. 115. It is contended by the appellant that error was committed because appellee in his examination of the jurors stated to the jurors his version of the law concerning the relation of passenger and carrier, and asked the jurors, if they had any quarrel with the rule, to which counsel for appellant made objection, and the objection was overruled by the court. The objection was on the ground that counsel for appellee did not correctly state the rule of law. Without passing on the propriety of that kind interrogatories,

[illegible]

and assuming that appellee's counsel did not correctly state the rule, and that the court might have properly sustained appellant's objection, it is not apparent how appellant was injured by the question whether the juror had any quarrel or prejudice against such a rule of law, and this cannot therefore not be considered a reversible error. Appellant also complains, that appellee's counsel in his opening statement referred to the fact, that one of the girls who were with the deceased, at the time he was killed, was his fiancee; and insisted, that this statement was prejudicial. But, it appears, that appellant's counsel in his cross examination of Anna Lindroth elicited from her the same fact, and brought it to the attention of the jury; obviously therefore, the appellant is not in position to complain, because this fact was brought to the attention of the jury. It is insisted also, that the court at the close of the plaintiff's evidence should have directed a verdict for the appellant, because the evidence clearly showed, that the deceased was guilty of contributory negligence; that it shows that the deceased voluntarily placed himself in a position of danger. Whether he was or was not guilty of contributory negligence in the position in which he was, when struck, was a question of fact for the jury to determine. The rule is, well settled that the question of contributory negligence is not a fact, and for the jury to determine from the evidence; *Boyle v. Chicago Junction R'y Co.* 256 Ill. 476; *Kelly v. Chicago City R'y Co.* 263 Ill. 640; *Peterson v. Chicago Traction Co.* 231 Ill. 367; *North Chicago Street R'y Co. v. Polkey* 203 Ill. 232. We

think therefore, that the court properly should direct a verdict. In this respect the attention should also be called to the fact, that special findings were submitted to the jury one of which was to find the fact of contributory negligence. The question of negligence of the subject was as follows: Did you find from a preponderance of the evidence, that the deceased negligently drove just before, and at the time he was in contact with the car in question, as to the exercise of ordinary care for his own safety? To which the jury returned an affirmative answer. No objection was made in the trial court, to this special finding, as the ground that it was unsupported by the evidence; nor was such a claim made or urged in the motion for a new trial. The point made by appellant, in the motion for new trial, that the verdict was against the weight of the evidence applied only to the general verdict; and not to the special findings. Inasmuch as the appellant did not claim error in the court below, as to the special findings, it was precluded in this court, from questioning the conclusions reached by the jury, in these findings. Avery v. Moore 102 Ill. 74; City of Aurora v. Rockabrand 149 Ill. 319; Morris v. Morris 101 Ill. 40; Kelly 156 Ill. 9; Empire Machinery Co. v. Smith 164 Ill. 58; Voight v. Anglo American Provision Co. 100 Ill. 462. This court also so held in the case of Wright v. Michigan Central R.R. Co., 653 Ill. App. 512. To this state of the record the matter of contributory negligence of the deceased so far as this appeal is concerned, is conclusively settled against the contention of appellant. Appellant contends, that the appellee, who is seeking to recover upon the ground

1941

Generalissimo Chiang Kai-shek

President of the Republic of China

Executive Yuan

Ministry of Education

Department of Education

Office of the Director

Office of the Secretary

Office of the Assistant Secretary

Office of the Deputy Assistant Secretary

Office of the Chief Clerk

Office of the Deputy Chief Clerk

Office of the Secretary of the Board

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that the deceased was a passenger of appellant's car, has no allegation in his declaration, that the deceased was a passenger at the time he was killed, and that the declaration therefore does not state a cause of action. We are of opinion, that the declaration alleges sufficient facts to show, that the relation of carrier and passenger existed at the time the deceased was killed.

On reconsideration of the questions raised concerning the instructions given for the appellee, we find that the first instruction complained of told the jury, that if they believe from the evidence, that the relation of passenger and carrier existed between the deceased Levahn, and the appellant; and that the place of the accident was a recognized station, where the appellant was in the habit of receiving and discharging passengers, that then it was the duty of the appellant, to use the highest degree of care and skill reasonably practical, and provide said Levahn with a safe place to take passage upon the car in question. There is no allegation in the declaration, that the appellant was guilty of negligence by not furnishing Levahn a safe place to take passage upon the car; and the appellee therefore would have no right to recover on that ground; but the jury by this instruction was led to conclude, that this was a proper ground for recovery. The fifth instruction informed the jury, that it was the duty of the appellant, to do all that human care, vigilance and foresight could reasonably do consistent with the character and mode of conveyance adopted, and the practical operation of its business to prevent accident and injury to

the deceased Levahn, if the relation of carrier and passenger existed; and, that if the appellant had failed or neglected to perform any duty enjoined upon it under the above rule; or if it had done some act in violation of the above rule, which resulted in the injury and death of said Levahn, then the appellant was guilty in this case. It is elementary, that the right to recover must be based on the particular negligence charged in the declaration; Crane Co. v. Hogan 228 Ill. 338; Chicago & Alton R. Co. v. Raburn 153 Ill. 290. And an instruction which does not limit a recovery to the particular negligence, which the declaration alleges, and concerning which issue has been joined, is erroneous; Patner v. Chicago City Ry. Co. 200 Ill. 169. The instruction is also obnoxious, because it assumes a fact concerning the deceased, about which there is a conflict in the evidence, namely that the deceased Levahn ~~is~~ stood at a particular place at the crossing. Instructions Nos. 8 and 10, also, are erroneous for the reason stated, namely, that they do not confine the right of recovery to the negligence charged in the declaration.

We are of opinion, that the errors in the instructions, pointed out amounts to reversible error; and that the case should therefore be submitted to another jury. The judgment is therefore reversed, and case remanded.

reversed and remanded.

[illegible]

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, do HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

Continued
17112

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

No. 6720.

L. B. Parker, Trustee of American
Trades & Savings bank of
Madison, Wisconsin,

Appellant,

vs.

J. S. Hand, Charles R. Carpenter,
Charles R. Paden, William S.
Paden and Sunnybrook Farm
Sanitarium.

Appellees.

219 I.A. 634

Opinion by VIFFAUS, J.

In this case a bill in equity was filed originally by Thomas Pagan as trustee in bankruptcy of the Estate of Charles R. Carpenter, bankrupt, against the appellees J. S. Hand, Charles R. Carpenter, Charles R. Paden, William S. Paden and Sunnybrook Farm Sanitarium. The object was to set aside certain mortgages given by Charles R. Carpenter to J. S. Hand, as fraudulent. The court sustains a demurrer to the bill; and by leave of court, a supplemental bill was thereupon filed by Pagan as trustee in bankruptcy for the use of the appellant L. B. Parker. A demurrer was also sustained to this supplemental bill. By leave of court the appellant as trustee of the American Trades & Savings Bank of Madison, Wisconsin, was substituted as co-appellant, and filed an amended and supplemental bill, to which the appellant again filed a demurrer. This demurrer was also sustained by the court, and the bill dismissed for want of

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equity. From the decree dissolving the said bill, appeal is prosecuted.

The last wherein the supplemental bill alleged, that Thomas J. Fagan as trustee in bankruptcy of Charles J. Carpenter, bankrupt, on October 20, 1912, filed his original bill of complaint against the appellees, praying that certain mortgages given by said Carpenter to the appellees J. S. Lane might be set aside, as fraudulent, and that the course of the pleading; the sustaining of the bill; the first bill, and the filing of the various amendments and supplemental bills, and the sustaining of the same be set aside. The bill then alleged, that on the 20th day of April 1913, Carpenter was the owner of the estate of J. S. Lane, of certain real estate which is described, situated in the county of Lake; and that on the 20th day of April 1913, Lane, claimed to be a creditor of Carpenter, in the sum of \$7000.00; and that on the 20th day of April 1913, Carpenter as trustee of the estate of J. S. Lane, paid out of \$3500.00 for money borrowed by Carpenter as trustee for the use of Carpenter, that Carpenter had no security whatsoever for the illegal indebtedness, either as an individual or as trustee; that on the date mentioned for the purpose of securing said indebtedness of \$7000.00, Carpenter executed notes of \$3500.00, the mortgages in question were executed and delivered to Lane, that the mortgages were dated the 13th day of September, 1912, but were in fact executed and delivered on the 20th day of January 1913, and were so late for the purpose of hindering, delaying and defrauding Carpenter's creditors; that on the 20th day of January 1913,

Carpenter was insolvent, and had been insolvent at all times since and before the 15th day of September, 1914, that said mortgages and each of them, created a preference, contrary to the provision of the Acts of Congress relating to Bankruptcy, and that Hant, at such and all times, had reasonable cause to believe, that Carpenter was insolvent; and that the enforcement of said transfers or, or of any mortgage would effect a preference contrary to the provision of said Acts of Congress, and that the mortgages were therefore made with the intent and for the purpose of hindering, delaying and defrauding Carpenter's creditors, and therefore null and void as against such creditors. That the real estate described in the mortgages, was a part of the assets of Carpenter's bankrupt estate, and passed to Thomas A. Fagan as trustee in bankruptcy, who thereupon became vested with the right to bring appropriate action or actions to have said mortgages, and each of them, removed as clouds upon the title to said land; and that on the 6th day of April 1916, within four months after the recording of the mortgages a voluntary petition in bankruptcy was filed by Charles E. Carpenter, and thereafter on the 6th day of April 1916 that said Carpenter was duly adjudged bankrupt by the District Court of the United States for the Eastern District of Wisconsin, and Thomas A. Fagan duly elected trustee in bankruptcy of the Estate of said bankrupt, and adjudged as such; and that on the 4th day of January 1917, Fagan as Trustee, in pursuance of an order of court in said bankruptcy proceedings, executed acknowledged and returned bill of sale and conveying to one Wallace Ingalls for the real estate described in

the mortgage in question, together with all interest of every kind and description which the said Charles E. Ingalls and trustee had in said real estate; which deed was duly recorded, and that on the same day the said Ingalls and Emma J. Ingalls executed acknowledged and delivered their proper deed of conveyance to the appellant, as trustee of the bank mentioned for all their right, title and interest in said real estate; which deed was also duly recorded, and that the appellant thereby became vested with all the right, title and interest in and to said real estate, and with the right to prosecute and maintain this action. The bill also alleges, that on the day mentioned, Fagan as trustee in bankruptcy, pursuant to an order of the court, assigned and transferred to said Emma J. Ingalls all claims and demands belonging to said bankrupt estate, including all actions, rights of action, causes of action of every nature and description, then vested in said estate in bankruptcy, which included the right to prosecute or maintain or to file the mortgages in question. And that Ingalls made an assignment of such right to the appellant, whereby appellant became vested with all the rights which said trustee in bankruptcy had, to have said mortgage as valid, and to set aside void as unlawful preferences. There are other allegations in the bill, but those referred to give the gist of the question which is presented to us for determination of this appeal, namely, whether the appellant by the deed referred to conveying the real estate to him, and by the assignment set forth in the bill, acquired the legal right to prosecute

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maintain this action to have the mortgages in question set aside as fraudulent preferences under the Bankruptcy Act. The act of preferring one creditor over another, when the debtor is insolvent, is not of itself a fraudulent act, under the laws of this state; it becomes so only under the provisions of the Federal Bankrupt Act, for the purposes of that act. Assuming that the appellee, Hand was preferred as a creditor in the giving of the mortgages in question, and that such preference was in conflict with the provisions of the bankruptcy act, and became thereby fraudulent under that act as to the other creditors of Carpenter; the duty to apply the legal remedy is placed by bankruptcy act on the trustee in bankruptcy; and he, and he alone, is vested with the power to act, if in his judgment a proper case is presented for the performance of such duty; and when he acts, it is for the benefit of all the creditors. Federal Statutes Ann. Page 1026 Sec. 60 b and page 1122 Sec. 67 e. It is apparent therefore that the mortgages in question, although voidable, were only so at the instance of the trustee, and in connection with the bankruptcy proceedings; and for the purpose of securing the relay a more equitable adjustment of the claims of creditors. It is well settled, that a trustee in bankruptcy cannot assign to another this right and duty to institute and prosecute legal proceedings to set aside a preferential transfer of property, which is made fraudulent by the bankrupt act. Welding-Hall Mfg Co v. Mercer & S. Lumber Co. 175 Fed. Rep. 335, Lovell v. Latham & Co. 221 Fed. Rep. 374; Glenny v. Langdon 98 U. S. 20,

Trimble v. Woodhead 102 U. S. 647, Loveland on Bankruptcy
1st, Edition page 488; Collier on Bankruptcy 11th,
Edition page 318; Lane v. Nickerson 99 Ill. 284,
Le Seure v. Weaver 108 Ill. App. 616. From the author-
ities cited, it is clear, that the appellant did not, and
could not by the conveyance of the real estate alleged in the
bill, and by the assignments therein narrated, acquire
the rights and duties of the trustee in bankruptcy to pro-
secute and maintain this suit and in its present form is
not a suit for the benefit of creditors. The demurrer
was properly sustained; and the decree dismissing the bill
for want of equity, is affirmed.

Decree affirmed.

for want of equity, the court was required to decide the case on the merits. The court found that the plaintiff had established a prima facie case of discrimination, and that the defendant had failed to rebut the presumption of discrimination. The court therefore granted summary judgment in favor of the plaintiff.

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STATE OF ILLINOIS, {
SECOND DISTRICT. { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

13172

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 634

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 3331.

Hero Furnace Company, Appellant.

vs. School Directors of District No. 41 of Henry County, Illinois, Appellees.

School Directors of District No.

41 of Henry County, Illinois.

Appellees.

219 I.A. 634

Nichols, J.

In this case the Hero Furnace Company, Appellant, District No. 41 of Henry County, Illinois, Appellees, entered into a contract with the Hero Furnace Company, under the terms of which the latter agreed for the sum of \$100.00 to install a furnace in the school house of District No. 41; and the contract provided that the furnace then installed by the company should heat the school house to 70 degrees Fahrenheit in the coldest weather; and that the floors were to be kept warm and that it would heat the room evenly. The contract was made upon the condition, that the appellees would keep the building in which the furnace was installed in a good state of repair (meaning light foundations, floors, windows, doors and ceilings.) The furnace was installed in the school house before the winter, but it was found that it would not heat the school room evenly, nor to a warmth of 70 degrees Fahrenheit, nor would it keep the floors warm. The appellees therefore refused to pay the amount claimed to be due under the contract, and a suit was therefore commenced in the circuit court of Henry County. The trial of the case resulted in a verdict and judgment in favor of the appellees, from which an appeal is prosecuted.

The only question argued on appeal is, whether the verdict is contrary to the evidence, and for that reason ought to be reversed. It is claimed by the appellant, that if the furnace failed to heat the school room evenly, and to a warmth of 70 degrees Fahrenheit; and did not keep the floors warm, it was proved, that the appellee had failed to keep the school building in a good state of

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STATE OF ILLINOIS,) ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT,) Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



(13120)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191A. 635

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

No. 6836.

Mueller Grain Company,
Appellee;

vs.

Chicago, Burlington & Quincy
Railroad Company,
Appellant.

) Appeal from Peoria.

219 I.A. 535

Opinion by NIEHAUS, J.

The appellee Mueller Grain Company, commenced this suit in the circuit court of Peoria county against the appellant, Chicago, Burlington & Quincy Railroad Company, to recover for a carload of oats, which had been delivered by the appellee to the appellant for transportation from Oak Hill, Illinois to Newport News, Virginia; and which it is alleged in the declaration the appellant failed to transport and deliver; whereby the appellee lost the oats. The first count of the declaration charges, a failure on the part of the appellant, to safely carry and convey the oats to the destination; and that the appellant sold and disposed of them, and retained the proceeds of such sale. The second count alleges, that the appellant carelessly, negligently and recklessly handled and managed the car containing the oats, and that on account of such negligence the grain was wholly destroyed, and rendered valueless. The appellant filed the general issue to the declaration, and the case proceeded to trial, which resulted in a verdict, and judgment in favor of the appellee for \$612.59. From this judgment an appeal is prosecuted.

vs.

Chicago, Illinois

Illinois

et al.

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CHARGE

The appellee was indicted for the same offense as the appellant in the second count of the indictment, to-wit: for the same offense as the appellant, Chicago, Illinois, and for the same offense as the appellant, recover for a period of six months, and for the same offense as the appellant, the appellee to the effect of the indictment, Hill, Illinois, to-wit: for the same offense as the appellant, alleged in the indictment, to-wit: for the same offense as the appellant, and delivery; whether for a period of six months, and for the same offense as the appellant, first count of the indictment, to-wit: for the same offense as the appellant, part of the indictment, to the indictment, of them, and retained, second count, and for the same offense as the appellant, gently and respectfully, the case, and that one was wholly destroyed, and the appellee filed the indictment, case proceeded to trial, judgment in favor of the appellee, judgment in appeal is reversed.

It is contended by the appellant, that the appellee had no right to recover because under the terms of the bill of lading, which was issued by the appellant for the transportation of these oats, it was a condition precedent to recovery, that the appellee make a claim for the loss in writing to the originating or delivering carrier within six months after the delivery of the property, (or in case of export traffic) within nine months after delivery at the port of export; or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed. The proof shows, that the oats in question were transported for export traffic, but were never delivered at the port of export; that the appellant was the originating carrier; and the Chesapeake & Ohio Railroad was the delivering carrier; that the C.C.C. & St. L. Ry. Co. was the connecting carrier; that the car containing the oats was wrecked while in transit on the C.C.C. & St. L. Railroad; and had therefore never passed into the control of the C. & O Railroad for delivery at the destination. The appellant received the oats on the 20th day of August 1917; on the 10th of November 1917, after the appellee had received notice from the C.C. & St. L. Ry. Co. of the wreck of the car containing the oats it filed its claim for damages with that company; no claim was filed with the appellant. The notice of the claim which was filed with the C.C.C. & St. L. Ry. Co. was transmitted however to the appellant; and it had in its possession and produced on the trial the original claim papers which had been filed with the C. C. C. & St. L. Ry. Co. We are of opinion, that the

the C. O. C. & St. L. Ry. Co.,
the C. O. C. & St. L. Ry. Co.,
the appellant, and it had in the possession
with the appellant. The appellant
claim for damages with the appellant
of the wreck of the car containing the
appellant had received notice of the
of August 1917, on the 10th of October
nation. The appellant received the
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G. O. C. & St. L. Ry. Co. and had in the
the car containing the date was
the C. O. C. & St. L. Ry. Co. and the
Gheasapeake & Ohio Railroad was the
that the appellant was the originating
traffic, one was never delivered to the
shows, that the date of delivery was
after a reasonable time for delivery
within six months (on nine months of
port of export; on the date of
export traffic) within the
months after the delivery of the
writing to the originating
recovery, that the appellant
operation of the
of loading, which was
had no right to recover

notice of the claim filed with the C. C. C. & St. L. Ry. Co. which was the connecting carrier in this case, must be considered under the circumstances, as notice to the Appellant, who was the originating or initial carrier: The connecting carrier is the agent of the originating or initial carrier for this purpose; Northern Pacific Ry. Co. v. Wall 241 U. S. 87; C.R.I. & S. Ry. Co. v. Linger 156 S. W. 296; Overton v. C. etc. Co. 160 N. E. Ill.; Lewellyn v. P. M. Ry. Co. 185 Ill. App. 171. However under the Cummins provision to the Carnack Amendment of the Interstate Commerce Act, which was passed March 4th, 1915, no notice or filing of claim is necessary, where the injury complained of, or the loss or damage of grain in transit, is the result of carelessness or negligence by the carrier; Conover v. Wabash R. Co. 208 Ill. App. 105. And this case in addition to the proof of the delivery of the oats in question as an interstate shipment to the appellant, as initial carrier there was proof of failure to deliver to the consignee. The failure to deliver to the consignee is presumptive evidence of negligence, and created a liability under the Carnack Amendment; Galveston H. & S. A. Ry. Co. v. Wallace; 223 U. S. 481. The proof of negligence was therefore sufficient; Chicago & N. W. Ry. Co. v. Collins produce Co. 235 Fed. 857; Mono Truck Silk Co. v. Adams Express Co. 166 Ill. App. 519; Ill. Custom Tailoring Co. v. Adams Express Co. 150 Ill. App. 374. And under these circumstances it was not essential to prove notice of claim or of the filing of a claim as a condition precedent to a recovery.

notice of the fact that the carrier was the carrier which was the carrier considered under the provisions of the Act, who was the original connecting carrier for the initial carrier for the purpose of the Act. v. Wall, 241 U.S. 197; 2 W. 983; Overton v. Lewis, 241 U.S. 197; the Commission provided in the Commission's Act which notice or filing of claim is required to be completed of, or the loss is the result of cancellation or refusal to accept the result of cancellation or refusal to accept in addition to the fact that the carrier there was proof of failure to deliver the goods. The failure to deliver is presumptive evidence of negligence under the Carmack Amendment; v. Wallace, 243 U.S. 481; therefore sufficient; Collins v. Co. 238 Fed. 2d 100; Adams Express Co. 188 Ill. App. 2d 100; v. Adams Express Co. 100 Ill. 2d 100. These circumstances are not sufficient of claim or of the filing of a claim to a recovery.

It is also contended, that the proper measure of damages to be applied in this case, was the one provided for, in the bill of lading; namely the value of the property at the place and time of shipment. It is well settled that in an action brought against a carrier for loss of goods which are destroyed before reaching the place of consignment the measure of damages is the value of the goods at the point of destination; Canadian Pacific Ry. Co. v. Wieland 228 Fed. 270 McCaull - Dinsmore v. C. N. & St. P. Ry. Co. 252 Fed. 684. In this case the oats had been sold by the appellee to the Wheat Export Company of New York for delivery at Newport News at 71½ cents per bushel. The oats therefore had a fixed value at Newport News, the point of destination, namely, the price that the appellee would have received therefor at that place under his contract of sale, and that was appellee's actual damage, which he was entitled to recover, and which he did recover by the ~~xxx~~ verdict and judgment.

Appellant also contends, that the court erred in admitting in evidence the papers embodying the claim filed by the appellee with the C. C. & St. L. Ry. Co. for the loss of the grain in question. We are of opinion that this evidence was properly admitted. Chicago & E. R. R. Co. v. Collins Produce Co. Supra.

The judgment is affirmed.

Judgment affirmed.

damages to be applied in this case, and the only way in which
in the bill of lading, namely the value of the goods at the
the place and time of shipment, and the value of the goods at the
an action brought against a carrier or owner of a vessel which
are destroyed before reaching the place of destination the
measure of damages is the value of the goods at the point of
destination; Canadian Pacific Ry. Co. v. "Island" (1911), 104
McGruir - Pinnore v. P. & O. Ry. Co. (1911), 104
In this case the case had been sold by the appellants to the
Wheat Export Company of New York for delivery at export
New at 7 1/2 cents per bushel. The case is stated as
fixed value at New York, the point of destination, namely
ly, the price that the appellees would have received there-
for at that place under his contract of sale, and that the
appellees' actual damages, which he was entitled to recover,
and which he did recover by the sum awarded and judgment.
Appellant also contends, that the court erred in
admitting in evidence the papers showing the difference
by the appellees with the C. O. Ry. Co. for the loss of the
loss of the grain in question.
this evidence was properly admitted.
Co. v. Collins produce Co. (1911), 104
The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191.A. 635

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6775.

The People, etc. Defendant
in Error,

vs. Error to Luke.

John Unger, Plaintiff in Error.

219 I.A. 635

DIBELL, P. J. John Unger was indicted, tried and convicted for refusing to act as a special deputy sheriff when summoned so to act under the provisions of the act of July 1, 1887, to secure the peace and good order of society, etc., being paragraph No. 256h, Chapter 38, Hurd's Revised Statutes, and was sentenced to three months imprisonment in the county jail and has sued out a writ of error to review the record.

He contends that the record is defective as to the empanelment of the grand jury which returned the indictment. The State has filed an addition to the record, which is supposed to cure the alleged defect. But a more complete answer is found in *People v. Munday*, 293 Ill. 191, where it is held that the proceedings for the empanelment of a grand jury are not a part of the record in any particular criminal case, begun by an indictment returned by such grand jury, unless upon a motion to quash the indictment, or on some other proper motion, the defect is shown. The showing must also be preserved by bill of exceptions to present it for review. The record does not disclose that this supposed defect was presented to or ruled upon by the court below. It is therefore not open for discussion here.

It is argued that the indictment is insufficient. Under the statute on which this indictment was based, the sheriff of a county must have determined that in his judgment the preservation of the peace and good order of society requires a number

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John Singer, et al.

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of special deputies, and he must form a judgment as to the number of which the exigencies of the case require, and he may then summon any person to act as such deputy, and if the person so summoned shall refuse to act he shall be guilty of a misdemeanor. Section 6 of Division 11 of the Criminal Code is as follows: "Every indictment or accusation of the grand jury shall be framed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. This indictment contains six counts. It is claimed that the official character of the officer who summoned defendant is not sufficiently in the indictment. Elmer J. Green is therein described as "The then sheriff of Lake County, Ill.;" also as "Sheriff of said Lake County, Illinois." In each count he is frequently described in these or very similar words. If the indictment had used two more words which I said: "Elmer J. Green, who was then and there the sheriff of Lake County, Illinois," the criticism on that subject would have no foundation. We are of the opinion that such is the meaning of the words actually used. It is next claimed that it is not sufficiently averred that Green was the sheriff at the time that he summoned Unger and the latter refused to act. To select language at random from this indictment, the second count says: "the said John Unger was then and there summoned by Elmer J. Green, the then sheriff of Lake County, to act as a special deputy sheriff," and in the 6th count it reads: "then and there said sheriff, Elmer J. Green, summoned as one of said special deputies said John Unger." Similar language is contained in the other counts. It is also contended that the indictment does not allege that at that time when the sheriff summoned Unger, it was the judgment of the sheriff that the peace and good order of society and the exigencies of the case required special deputies. The first

count alleges that Unger was summoned by Green, then then sheriff, to act as a special deputy sheriff, when in the judgment of the said Elmer J. Green, sheriff of said Lake County, Illinois, "the preservation of the peace and good order of society required the summoning of a large number of special deputy sheriffs." The fifth count contains similar allegations and avers that that being the judgment of the sheriff, he summoned as one of the said deputies the said John Unger. To similar effect is the 8th count. Each of these counts names October 4, 1919, under a videlicet, as the date when Unger was summoned and refused. We are of opinion that the indictment is sufficient.

It is contended that the evidence fails to prove that such was the judgment of the sheriff on October 4, when he summoned Unger. The proof is that a strike began in Lake County about September 22; that the sheriff and the police felt unable to deal with it and called upon the Governor for assistance; that the Adjutant General was sent to the place and informed the officers that no help would be furnished till the sheriff had exhausted his powers; that on September 26 there was a gathering of 3,000 people, and stones and other missiles were thrown and property was destroyed and persons were injured; and that the sheriff then determined or formed the judgment that a large number of special deputies were necessary, and from time on for a week or ten days he summoned special deputies in large and had special deputies in service till November 2. He did not expressly testify that on October 4, when he summoned Unger, he still had the judgment that special deputies were necessary. It is, however, apparent from the proof that the same disordered conditions existed in the community on October 4 as on September 26 and the verdict of the jury is equivalent to a finding to that effect. We think also that the rule stated in 10 R. C. L. 872,

applies to this situation. It is as follows: "When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." *Follitt v. I. C. R. R. Co.*, 209 Ill. App. 81, in which case a certiorari was denied. Unger's counsel does not question the evidence in any other respect nor does he deny but what Unger was summoned to act as deputy sheriff and that he refused.

Complaint is made of the giving of an instruction requested by the People, no numbered in the abstract, but No. 17 in the record, which is as follows:

"The court instructs you that the doubt which will justify an acquittal is as to the guilt of the accused on the whole of the evidence in the case, and not as to any particular fact or circumstance relied upon or sought to be proved. If after considering all the evidence in this case, taken and considered together, the jury are satisfied of the defendant's guilt, beyond a reasonable doubt, they should so find notwithstanding every particular link or circumstance in the chain of evidence sought to be proved may not be established beyond a reasonable doubt."

It is argued that every instruction which directs a verdict should state all the facts necessary to be proven to authorize such verdict. The rule is as claimed, but this instruction was not intended to tell the jury what must be proved in order to justify a verdict of guilty. The purpose of the instruction was to tell the jury that it was not necessary that every particular link or circumstance in the chain of evidence sought to be proved must be established beyond a reasonable doubt. We are of opinion that it was not error to give that instruction.

The judgment was the severest which the statute authorized. That fact alone does not authorize us to interfere and substitute our judgment for that of the trial judge. We find no reversible error in the record and the judgment is therefore affirmed.

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer. I took a deep breath, savoring the scent of pine and the distant sound of water. The world seemed so quiet, so peaceful. I walked towards the lake, my feet crunching on the dry leaves. The water was still, reflecting the sky and the surrounding trees. I stood on the shore, watching the gentle ripples dance across the surface. It was a beautiful sight, a perfect moment in time. I felt a sense of calm, a sense of belonging. This was my escape, my sanctuary. I had found it, and I was grateful.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is to collect data. This is done by the investigator who is responsible for the study. The next step is to analyze the data. This is done by the investigator who is responsible for the study. The next step is to interpret the data. This is done by the investigator who is responsible for the study. The next step is to report the results. This is done by the investigator who is responsible for the study.

error in the record and the judgment is an error.

STATE OF ILLINOIS,)
SECOND DISTRICT. { ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6796

Daisy Petro, Administratrix, etc.,

Defendant in error,

vs

Error to Kankakee.

Walker D. Hines, Director General,

etc. Plaintiff in error

21914.635

Dibell, P. J.

John Petro was struck and killed by the engine of a passenger train on the Chicago & eastern Illinois Railroad while going over said railroad at a farm crossing on April 1, 1918. He left next of kin for whose benefit this suit was brought by the Administrator against the Director General of Railroads operating said Chicago & Eastern Illinois Railroad, and against a Receiver of said Railroad Company. Afterwards and before the return day, plaintiff dismissed the suit as to the Receiver. Plaintiff filed a declaration in two counts. The first count set up the statute requiring head lights upon passenger locomotives between sundown on said day and that defendant failed to maintain any light on the head of said locomotive, and by reason thereof Petro was prevented from seeing the engine and train approaching and was killed by reason thereof. The second count charged that defendant so negligently operated said locomotive and train that by reason thereof Petro was struck and killed. Defendant pleaded the general issue, and there was a jury trial and a verdict for plaintiff for \$10,000. A motion by defendant for a new trial was denied and plaintiff had judgment on the second verdict. This is a writ of error to review said record.

The general course of said railroad is north and south. Between Grant Park on the north and Momence on the south in Kankakee County, Petro occupied what was known as the Graham farm, and the Railroad crossed it some where near the center. Petro has occupied the farm as a tenant a littel over a year. The land east of the

Gen. No. 673

Deputy, Police, ...

Deputy, Police, ...

vs

Walker D. ...

Deputy, Police, ...

Dibell, P. A.

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tracks was level and without timber, as shown by the photographs in evidence. On the western part of the farm was a hill and on it many trees near the railroad. The farm buildings were in that grove. The railroad skirted along the eastern foot of the hill and in so doing described a curve. Between the farm buildings and the eastern part of the farm was a farm crossing by which the farmer could cross said railroad, with gates in the right of way fence on each side of the railroad. If one stood on the crossing and looked north or south the curve was to the west. Access from the farm building to the public highway was over said farm crossing and went across the eastern part of said farm. Petro had been working upon that part of the farm east of the railroad and was returning home. At this point the railroad has three tracks. The west track was the south bound track on which the train was going south which struck Petro. He was very deaf but could hear a locomotive whistle on a passing train. He was struck about 7:25 P.M., which was about ten minutes after sundown. The clear preponderance of the evidence was that the headlight on the engine was not burning. The evidence introduced by defendant on that subject, when read in full in the record, is not satisfactory. It seems probable that as Mokence, less than a mile and a half further on, was the end of the run for that train and was to be reached very shortly after sundown, the engineer either forgot or thought it not necessary to turn on the headlight. The jury were well warranted in finding that it was not burning, and that the charge of negligence made in the first count of the declaration was sustained. Petro had a right to rely upon defendant to obey that statute. We collected the authorities to that effect in *Follett v. I. T. R. R. Co.*, 200 Ill. App. 289, as applied to ordinances. The rule as to statutes is the same. Whether the absence of the headlight caused Petro's death was a question for the jury. Under the second count plaintiff claims that because of the hill west of the tracks and the grove thereon, and the position of the railroad curving to the east and then to the west at

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the immediate foot of said hill, and because of the shadow and fog and the atmospheric conditions then prevailing, defendant has a common law duty to give notice by whistle or bell or otherwise of the approach of the train to this farm crossing, and that defendant gave no such notice, and that the death of Petro was due to the failure to give such notice. The rule of law relied upon under the second count is thus stated in C. B. & Q. R. R. Co. v. Perkins, 125 Ill. 137:

"A railroad company, in the running of its trains, is required to use ordinary care and prudence to guard against injury to the person or property of those who may be traveling upon public highways and are required to cross its tracks, whether required by statute or not. The fact that the statute may provide one precaution, does not relieve the company from adopting such others as public safety and common prudence may dictate. Shober v. St. Paul, Minneapolis and Minnesota Railway Co., 28 Minn. 107."

This rule has been applied to the speed of trains in populous places in Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 133; R. J. & E. Ry. Co. v. Raymond, 148 Ill. 241; Partlow v. I. C. R. R. Co., 150 Ill. 321; and Overtom v. C. & E. I. R. R. Co., 181 Ill. 323. In the Dunleavy case, supra, the court said: "Railroad companies, where there is no express statute of ordinance, are bound by the rules of the common law to exercise their franchises with a due regard to the interests, the welfare, and the safety of the public." Plaintiff introduced proof that there had been a hard rain that day; that at the time of the accident there was darkness at that place, caused by in part by the shade of the trees at that crossing; that the sky was dark; that it was foggy at that time and the fog was rising; and that if one was crossing the railroad track there going west, the view to the north would be shaded. Defendant introduced proof that it was not foggy; that it was a clear day; that there was no darkness; that the trees

The value of the immediate factor was not considered by the court in its decision. The court stated that the value of the immediate factor was not considered by the court in its decision.

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38 Minn. 100.

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cast some shadow over the track at that place but not much; but one of its witnesses testified that it was cloudy or hazy. Defendant introduced five photographs, taken by its photographer on June 12, 1918. Photograph No. 3 shows the situation as it was to Petro as he approached the track at the time he was killed, except that the photograph was taken in broad day light. Defendant also introduced photographs numbered 6, 7, 8, and 9, taken on September 11, 1919. It was proved that No. 8, taken in September, 1919, was not a correct representation of the crossing looking north at the time of the accident, because hedge and brush inside the farm fence which shaded the track and the view of one looking north had all been cut away between the time of the taking of the two sets of pictures, by a later tenant on the farm. The engineer testified for defendant that he blew the whistle as he approached the farm crossing. This tended to show that defendant recognized this farm crossing as a place where it was its duty to give warning under the common law rule above stated. Whether this was such a place and the surroundings such that such signals should be given especially on a cloudy, foggy day at the edge of the evening, was a question of fact for the jury. We must assume the jury found that such a case was made and we cannot say they should have found otherwise. The proof by the trainmen was that the whistle was blown as the train approached the farm crossing and that an automatic bell was ringing. Witnesses for plaintiff, situated where they were accustomed to hear the trains, testified that they did not hear any such signals, This presented a question of fact for the jury. After two juries have found against defendant and the trial judge has approved their finding, we cannot say that their verdict is not supported by the evidence or that another jury would find differently on this subject. There may have been that in the manner of the trainman when testifying which justified the jury in their conclusion.

Plaintiff proved by several witnesses that Petro was a man of

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careful habits with respect to care and caution for his own safety. The abstract does not fully set out what the record shows occurred when the question was first put. Defendant's counsel objected that this evidence was not competent unless it was shown that there were eye witnesses. Plaintiff's counsel then stated that there were no eye witnesses, and also that if he could raise a substantial doubt that there was an eye witness, the testimony was competent. When plaintiff's counsel stated that there was no eye witness, defendant's counsel did not assert that there was any eye witness. Of course, it could not be affirmatively shown that there was no eye witness in any case. At the time this objection was made there had been nothing tending to show that there was an eye witness. The place was in the country where few persons would be likely to be, A. similar situation was presented in C. & A. Ry. Co. v. Wilson, 128 Ill. App. 88. Speaking on this subject we there said:

"Plaintiff's proofs did not disclose that any one saw the accident. When testimony of this character was first offered defendant objected on the ground that such evidence was only competent where nobody witnessed the accident. The attorney who made that objection was then asked if he claimed there was an eye-witness to this accident, and he made no reply. This is omitted from the abstract. It was after that silence that the court admitted the testimony. There was certainly no error in its admission under those circumstances."

In the Appellate Court of the First District in Standard Brewing Co. v. Erie R. R. Co., 167 Ill. App. 302. plaintiff offered testimony of the habits of deceased and its counsel stated to the court that he thought there was no eye witness to the accident, and counsel for defendant did not deny this, and the court admitted the testimony and this was treated as correct. We conclude that as defendant's here did not assert that there was any eye witness the court properly permitted the question to be answered. When the same inquiry was made of other witnesses for plaintiff, the objection was only that it was not competent, and under three circumstances the court did not err in permitting the questions to be answered. Defendant claims that thereafter it introduced the evidence of two eye witnesses, viz. the engineer and the fireman on the train.

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The engineer was not an eye witness. He saw the body of Petro roll off the track to the west, but he did not see him as he approached and went upon the railroad track and knew nothing of the conduct of deceased before he was struck. The fireman testified that he first saw Petro at the east gate; that he was then either closing it or had just closed it; that he started walking in a normal way across to his home till the witness got within 175 feet of him; that Petro then looked up on the direction of the train and ran west across the track. Plaintiff contends that this evidence is not true. The court at the instance of defendant gave several instructions on this subject, which would have required the jury to find for the defendant if they believed the testimony of the fireman. There are several things relied upon by plaintiff as justifying the jury in disbelieving the fireman. The fireman testified that when he first saw Petro he was between 1,000 and 1,300 feet away. It was proved in rebuttal that at the coroner's inquest the fireman testified that he saw Petro about 300 feet ahead. The engineer was keeping a lookout ahead and he did not see Petro at all. It is argued that as he approached the crossing and the track curved to the east around the hill, he could and should have seen Petro and his action if he was running towards the train. It was also a matter upon which counsel for plaintiff might reasonably argue to the jury that the fireman was a servant of defendant and might desire to favor the defendant and might desire to screen himself from censure and that he was one of the men operating the instrumentality which caused the death of Petro. There may have been that in the fireman's demeanor on the witness stand which tended to discredit him. After two juries have disbelieved him and the trial judge has approved that conclusion, we feel that we ought not to say that the jury should have believed him. At the close of all the evidence defendant moved to exclude plaintiff's evidence as to the careful habits of the deceased and this motion was denied. The question thus presented is whether, where plaintiff does not show an eye witness but defendant pre

presents an eye witness concerning whose testimony there was a question whether or not it was true, and which the jury might reasonably disbelieve, did that evidence by defendant require the exclusion of the previous evidence of the careful habits of deceased. In C. R. I. & P. Ry. Co. v. Clark, 108 Ill. 113, it was held that evidence of the care, prudence and sobriety of the deceased was competent if there was no eye witness and was not admissible if there were eye witnesses. This has been following in many cases. In I. C. R. R. Co. v. Ashline, 171 Ill. 313, equalization of this rule was made to the effect that if the evidence leaves the question in doubt whether any person saw the deceased when he was struck by the train the evidence of careful habits is admissible. This question seems not to have been again presented to the supreme court. There are several cases, however, where evidence of careful habits was held competent, though deceased was seen almost immediately before he was killed and in the very place where he was killed. In I. C. R. R. Co. v. Nowicki, 148 Ill. 29, deceased was standing on one track of a double track railroad, waiting for a freight train to pass on the other track and was seen standing therein a place of danger very shortly before he was killed. There, as here, a train came around a curve at a high rate of speed and struck and killed him and the engineer saw his body roll off the pilot of the engine. Proof that deceased was sober, industrious and possessed of all his faculties was held competent. In C. & A. Ry. Co. v. Wilson 225 Ill. 50, the deceased was seen by the engineer almost immediately before she was struck, but it was held that notwithstanding that fact, the evidence of her careful habits was competent. The evidence of careful habits having been properly admitted here in the first instance, the court could not have granted the motion to exclude that evidence, made at the close of all the evidence, without passing upon the creditability of the fireman. As the question was then presented it was a question of fact which the court was required to leave to the jury. We conclude that there was such a situation presented as to the creditability of the fireman so that the verdict of two juries on that subject may

now be disturbed by us.

The court refused instructions Nos. 31, 32, 23, 24 and 35, requested by defendant. The 31st was that there was no statute in force requiring defendant to ring a bell or blow a whistle for the crossing in question. We think it might very well have been given in view of the 5th instruction given for plaintiff that the violation of any statute designed for the protection and safety of the public is negligence per se, if it is the proximate cause of an injury; but there was nothing in pleadings or proof or in instructions given for plaintiff to indicate that plaintiff claimed that a statute required defendant to ring a bell or blow a whistle at that farm crossing, and therefore it seems to have been unnecessary to give this. Besides, plaintiff was claiming that the common law and the surroundings at the crossing did require defendant to give signals. The jury might not have understood the difference between common law and statute and might have interpreted this as an instruction that there was no law requiring defendant to give signals at that place. It was not error to refuse it. The 22nd instruction was sufficiently covered by given instructions. The same is true of the 23rd and 24th, and also of the 25th, except that it undertook to tell the jury the purpose of the law requiring a head light to be maintained and this was not a matter upon which it was necessary to instruct the jury.

Complaint is made of instructions given for plaintiff. No. 3 told the jury that they were at liberty to disregard the testimony of any witness who had knowingly and wilfully sworn falsely in a matter material to the issue, except so far as corroborated, etc. It is claimed by defendant that there was no witness to whom it could apply. We are of opinion it was a proper instruction under the evidence in this record. The criticism upon plaintiff's other instructions, except Nos. 1 and 8, do not require further discussion. No. 1, besides other matter, told the jury that if plaintiff's intestate was in the

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exercise of ordinary care and caution for his own safety and if the jury believed from the evidence that his death was proximately caused by the negligence of the defendant, the jury should find the defendant guilty. To make this a perfect instruction it should have submitted to the jury also the question whether defendant was negligent in the respects charged in the declaration, specifying them. The 8th instruction contains the same defect or omission. These instructions did not directly assume that defendant was negligent. The jury could not find that the negligence of defendant caused the injury without first finding that defendant was negligent. In Taylor v. Felsing, 164 Ill. 331, the 4th instruction given for plaintiff began as an abstract proposition of law and then said that if in such case an injury resulted to the servant from the defects specified in the abstract proposition while plaintiff was in the exercise of ordinary care for his safety "from the negligence of his employers in manner and form as charged," then the servant could recover. It was not distinctly left to the jury to decide whether the employer was negligent in manner and form as charged. The form of the instruction was not approved but it was held not reversible error. In the present case instruction No. 16, given at the request of defendant, told the jury that before they would be warranted in finding the plaintiff certain things must be proved by a preponderance of the evidence, one of which was "that the defendant was guilty of negligence that was the proximate cause of the injury" so that the jury were informed that to authorize a recovery negligence of the defendant must be proved and that said negligence was the proximate cause of the injury. Said instructions 1 and 8 ought also to have told the jury for what acts of negligence recovery could be had, restricting them to those charged in the declaration, but defendant's instruction on the subject was in equally general terms, and there was no proof tending to show any other negligence than the matters we have referred to, and we are of opinion that there was no evidence which could have led the jury to

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v. Helmsing, 104 Ill. 381, 1st instruction gave no hint
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not distinctly left to the jury to decide whether the employer was
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was not approved but it was held not reversible error. In the present
case instruction No. 16, given at the request of the defendant, the
jury that before they would be permitted to find the defendant's negligence
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in equally general terms, and the jury were instructed that the defendant's
other negligence in the defendant's negligence and the jury were instructed
conclusion that there was no evidence to support the defendant's negligence

find defendant guilty of any other negligence.

It is argued that the damages are excessive. The proof is that Petro was 50 years old at the time of his death and that he made about \$2,000 per year at farming, which had always been his business. There was no proof to the contrary. We cannot say that his future life would not have been worth to his family the amount of the judgment.

It is contended that the declaration does not state a cause of action because it only alleges due care when deceased was on the railroad track and not as he approached it. Defendant did not demur to the declaration and did not move in arrest of judgment and we are of opinion that the sufficiency of the declaration is not presented for our consideration. But, if it had been so raised, the allegations are not as supposed. The term "farm crossing" as used in the declaration, means the entire passageway from the gate in the west fence to the gate in the east fence, and it is that crossing and not merely the space between the rails of the west track which the declaration avers that he was walking upon in the exercise of due care for his own safety, that is, as he was approaching the railroad tracks.

The case is a close one because of the evidence of the fireman, but we are of the opinion that after two verdicts for plaintiff the record does not require us to submit the case to another jury.

The judgment is therefore affirmed.

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STATE OF ILLINOIS,)
SECOND DISTRICT.) ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191.A. 635

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6803

Orin O. Ogle, et al.,
Appellants,

vs

Appela from Henderson,

Charles H. Ditto,
Appellee.

219 I.A. 635

Dibell, P. J.

Orin O. Ogle and Tom Haney sued Charles H. Ditto to recover commissions for bringing him a buyer for his farm. The declaration consisted of three special counts and the common counts. Defendant pleaded the general issue. At the close of plaintiff's proofs the court directed a verdict for defendant, which was rendered. A motion for a new trial by plaintiff's was denied. Defendant had judgment and plaintiff's appeal. The verdict entitled defendant to a judgment in bar, but such judgment was not rendered. Town of Magnolia v. Kays, 300 Ill. App. 132. If the point had been raised by counsel, it would have been our duty to return the record to the court below for a proper judgment.

In July, 1919, plaintiff's were in partnership as real estate agents and defendant had a farm which he wished to sell. He had asked \$200.00 per acre but he entered into an arrangement with plaintiff's on July 14 that if they would bring him a buyer for the farm at \$190.00 per acre, which they figured would amount to \$31,160.00, he would give them the \$1,160.00, and he would give them thirty days in which to do this. They entered into negotiations with Tom O'Malley and his father, Hugh O'Malley, by which Hugh O'Malley agreed to buy the property at that price. It was arranged between all parties that O'Malley should give a note or check for a certain sum and the balance in cash on the first of March following. O'Malley made and signed such a note and arranged with a local bank that it would cash the note for defendant at any

Gen. No. 8830

Orin O. Davis, et al.

Defendants

vs

Charles H. Davis

Plaintiff

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Dibell, W. J.

Orin O. Davis, et al.

Commissioners for the State of New York

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time he wanted the money, and defendant was notified of that arrangement. O'Malley arranged with the bank for the cash to pay for the land on March first. The proof was explicit that O'Malley was ready, able and willing to pay for the farm at the time named. After defendant had given plaintiffs authority to bring him a buyer for the land on the terms named and had agreed what their compensation should be and had agreed they should have thirty days within which to find such buyer and had agreed that during that thirty days he would not sell the land himself, he told them that he wanted the contract and the deed to contain a provision to permit him to hunt upon the land. Plaintiffs told him that it probably could not be sold with that provision, and he told them in effect that he would not insist upon it if it would prevent a sale. When this was made known to O'Malley after he had agreed to buy the property on the terms previously named, he said to defendant that defendant was welcome to hunt on his land and he would give defendant a written permit to do so, but he could not allow that to go into the contract or deed, for that would create a cloud upon the land. The agents had a contract prepared and signed by O'Malley which did not contain the hunting privilege, and it was left at the bank for defendant's signature. Defendant caused an officer of another a bank to prepare another contract with that provision in it, which defendant executed and left at that bank for O'Malley's signature. It is said that there was some slight defect in the description in the first contract, but what it was does not appear. O'Malley went to look at the land again and did not get back in time to go to the second bank that day. The next morning defendant telephoned that as O'Malley did not sign the contract by eight o'clock of the preceding evening, the deal was off and he must have \$200.00 per acre for his land. This suit followed.

What plaintiffs were authorized to sell was the entire land. The right which defendant afterwards proposed to reserve in the contract

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and deed, to hunt upon the premises during his life would have established and made of record what is known as a right of way in gross, and it would have given him the right of access to and egress from this land at his will during his lifetime. This would have been to reserve an interest in the premises which would be regarded as a burden thereon. Willoughby v. Lawrence, 116 Ill. 11. After defendant had authorized plaintiffs to find him a buyer within thirty days for a certain price for the entire farm, he could not change the terms so as to reserve an easement in himself for his life and thus defeat a sale to the buyer whom they had procured, and thereby defeat their right to the agreed commissions. In Fox v. Ryan, 240 Ill. 381, the rule applicable is thus stated: "Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing and able to purchase the property upon the terms proposed by the seller, he is entitled to his commissions, even though the seller refuses to perform the contract on his part." To the like effect is Oliver v. Sattler, 333 Ill. 536. We do not think it ought to be held, under the facts in this case, that a written contract must be signed by both parties before the broker has become entitled to his commissions where, as here, the broker prepared a contract and the buyer signed it and left it where the seller could sign it, but the seller refused to do so and required the insertion therein of the reservation of an easement not embodied in his original contract with the brokers. The thirty days had not expired. The agents had done all they could to have the seller sign the contract which they had prepared, which conformed with the terms of their employment and which the buyer has signed. The failure of the seller to sign was his own fault, and indeed, it may well be that the contract which the buyer did sign was binding upon him and could have been enforced by the seller without his signature thereto. Ames v. Mcir, 130 Ill. 582; Memory v. Newport, 131 Ill. 623; Forthman v. Deters, 206

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Ill. 159; Miers v. Chas. H. Fuller Co., 167 Ill. App. 49; Lowber v. Connit, 36 Wis. 178; Dupuis v. Kinnis, Ill. App. Defendant has no right to take this land out of the hands of the plaintiffs during the thirty days. The evidence creates the impression that defendant insisted on this hunting reservation in order to prevent a sale of the property at \$190.00 per acre. Apparently when he found that \$190.00 per acre could be obtained, he decided that he would abandon that proposition and charge \$200.00 per acre. We are of opinion the court should not have directed a verdict for defendant.

Plaintiffs insist that even if the trial court was right in holding that they could not recover under their contract, still they should have been permitted to recover under the common counts. Perhaps that position might be supposed to be sustained by Richardson v. Aiken, 84 Ill. 221, but we regard Parly v. Farrar, 169 Ill. 606, and Lawrence v. Rhodes, 133 Ill. 36, as conclusive against that position as applied to the facts in this case.

The judgment is therefore reversed and the cause remanded.

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STATE OF ILLINOIS, }
SECOND DISTRICT. }

ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 635

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6806

41

Charles M. Glidden,

Appellee,

vs.

Appeal from Peoria.

Harrington Manufact-

uring Co., a Corporation,

Appellant.

219 I.A. 635

Heard, J.

August 31, 1918, between three and three-thirty o'clock P. M. appellee, who was riding a bicycle on West Washington street, in East Peoria, was run over and badly injured by an automobile truck belonging to appellant. Appellee brought suit against appellant to recover damages for the injuries he had sustained and in his declaration, consisting of four counts, in the first count charged general negligence in driving and managing the automobile truck, in the second count charged driving the truck at an unlawful rate of speed, in the third count a failure to sound a horn or give warning and in the fourth count charged wilfull negligence. The fourth count was taken from the jury by the court and no cross error has been assigned. The trial in the circuit court resulted in a judgment for \$7500 in favor of appellee, from which judgment appellant has perfected this appeal.

The street upon which the accident occurred is the main street connecting Peoria and East Peoria, in which latter place are situated several large manufacturing establishments, in one of which, the Holt Manufacturing Co., appellee was employed.

West Washington street at the time of the accident and for a long time prior thereto was being repaired and the street car tracks thereon being removed from the outer edge of the street to the center. The street car tracks on the left-hand side of the

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street going toward Peoria were first changed and put in the center, and the pavement was laid on the left-hand side in such a way that on the right hand side of the street, so that travel could continue on the left-hand side, while the right hand side was being fixed as aforesaid. In connecting the new street car tracks from the point where it had been changed to the center of the street, with the old track which was still on the outer edge of the right hand side, the tracks angled over in the form of a "Y" and this point, which it is agreed was at the Peoria or west entrance of the Alterfer Washing Machine Company, is referred to all the way through the evidence as the "Y". Up to this point the street was repaved and in good condition on both sides of the street, but from there on the right-hand side of the street was all torn up, full of holes, and a lot of cinders and old brick dumped there in irregular piles, causing the right hand side of the street to be in an unusable condition. The street was 44 feet wide from curb to curb and the left hand side which was open for traffic was paved from 24 to 30 feet in width for about 60 feet further than the "Y". From the end of this paving a good dirt road extended on towards Peoria on the left hand side of the street sufficiently wide for vehicles to pass each other in safety.

At the time of the accident there was in force in the Village of East Peoria an ordinance which among other things provided as follows:

Section 11.-Any driver or person having possession, charge or control of any vehicle, driving on any street, shall keep as close to the right hand curb as safety and prudence shall permit, except when overtaking or passing another vehicle.

Section V.-Vehicles moving slowly shall keep as close as possible to the curb on the right, allowing more swiftly moving vehicles free passage to their ~~right~~ left.

Section VIII.-Any vehicle overtaking another vehicle moving in the same direction shall pass on the left side of the overtaken vehicle. Slowly moving vehicles shall keep as close as possible

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to the curb on the right so as to permit faster moving vehicles free passage on the left.

Section XXVI.-Every person in charge of a vehicle shall pull to the right side of the street or road when signalled from a vehicle behind desiring to pass.

Section XXXVI.-The word "Vehicle" when used in this ordinance, shall include equestrians, led horses, carriages, carts, drays, hackneyed coaches, omnibuses, wagons, motor vehicles, and all other vehicles used for transporting persons or property on the public streets, however drawn, driven or propelled, except street cars, carts, carriages, or barrows, propelled by hand."

Section 268 p. chapter 121, Illinois Revised Statutes of 1917 provide: "Any such person so operating a motor vehicle or motor bicycle shall, on overtaking any such horse, draft animal or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal or other vehicle shall, as soon as practicable, upon signal turn to the right of the center of the beaten track of such highway so as to allow free passage on the left."

Appellee was an employee of the Holt Mfg. Co., and had worked on the day of the accident up to about 3 o'clock P.M. when there was a shift made of the company's employees. After quitting work he and a fellow workman started home towards Peoria on the street in question both riding bicycles, about two feet to the right of the the right rail of the street car tracks, appellee being about four feet ahead of his companion.

Appellant's chauffeur in charge of one of its auto trucks came past the Holt plant shortly after the 3 o'clock shift was made, going towards Peoria. The truck was not loaded and about twenty of the Holt employees got onto the truck. The truck then preceeded astride the right hand rail of the street car track and some distance behind appellee. There is a sharp conflict in the evidence as to how this accident happened and as to where it happened on the street. There are two distinct theories shown by the testimony as to how the accident happened. Appellant contends that when the truck had

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reached a point of about 150 feet to the rear of the approach of the truck appellee and his companion, the driver of the truck gave a signal of the approach of the truck and that the appellee and his companion turned and saw the truck, and at that time the appellee was some two or three feet to the right of said rail and somewhat to the right of the right hand wheel of the truck, if the line of travel of the truck had been extended. That they continued in that position in the street, the truck gaining on the appellee until the truck had reached a point some six or eight feet to the rear of the appellee, that the driver of the truck undertook to pass the appellee to the left; that he gave other signals of his presence and the presence of the truck and that thereupon, immediately, without notice to the driver of the truck, the said appellee turned or cut in front of the truck, and was thereby run^{down} by the truck and that the accident occurred from 150 to 200 feet before reaching the "Y" and at a place where the street was in perfect condition and traversable from curb to curb. Appellee contends that when he reached a point near the "Y" where the paving continued only five or ten feet further that he necessarily started to cross over to the left side of the street, as it was customary for him to do and that he was struck and run over by appellant's truck while it was running at a high and dangerous rate of speed and without giving any warning of its approach.

It is contended by appellant that appellee was guilty of contributory negligence in unexpectedly swerving in front of appellant's truck. Appellee testified before he started to cross the street he looked back and saw the auto truck at least 150 feet behind him; that he then started to cross the street at an angle of 45 degrees; that after he had gone eight to ten feet he again looked back and saw the auto truck about 100 feet behind him and that he then continued to cross and had reached the other side and proceeded along the left curb of the street twelve or fifteen feet when he was struck.

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appellant's truck. The truck was in the same lane

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a plaintiff in any given case depends on the facts and circumstances of the particular case and is ordinarily a question of fact for the jury. When appellee looked back the second time he knew, if his testimony be taken as true, that the auto truck had gained fifty feet upon him while he was going from 8 to 13 feet and while he says that he saw that he had plenty of room to go over to the other side, he should have known that if the relative rates of speed were maintained and his continued to cross at an angle of 45 degrees the truck would overtake him before he was two-thirds of the way across. He is presumed to have known that it was his duty to keep as close as possible to the curb on the right to allow the more swiftly moving vehicle free passage on his left. He is presumed to have known that it was the duty of the driver of the auto truck to pass on the left of an overtaken vehicle. Under such circumstances an attempt to take a change and cross the street in front of the truck was certainly a mistake in judgment. But estimates of distances by witnesses are notoriously inaccurate and while as to a driver of a truck going 25 miles per hour, 100 feet would appear a very short distance, to a person riding a bicycle it might appear much longer. Were this question of the exercise of judgment on the part of appellee the only question involved we might feel constrained to say that the question of contributory negligence was a question ^{of} fact for the jury and that we did not feel disposed to interfere with their finding.

Appellant earnestly insists that at the time and place of the accident appellee was violating an ordinance of the Village of East Peoria; that such violation constituted negligence per se and that such negligence is a bar to appellee's recovery in this suit/ It does not necessarily follow as a matter of law that a plaintiff cannot recover if at the time of the accident he was engaged in the violation of any ordinance. *Star Brewery Co., v. Hauck*, 222 Ill. 346; *Johnson v. Palace Livery Taxi Cab Co.*, 2nd Dist. App., opinion filed June 29, 1930. To bar recovery on that ground it must appear that the violation of the ordinance was the proximate and efficient cause of the injury. *S.B.Co., v. Hauck*, supra; *Johnson v.*

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P.L. & T.C. Co., supra; Latham v. C.C.C. & St. L. Ry. Co., 179 Ill. App. 384; L. S. & M. S. Ry. Co., v. Parker, 131 Ill. 557.

In this case there is no question that at the time of the accident appellee was violating an ordinance of the Village of East Peoria and so was guilty of negligence per se. Grubill v. Black, App. Ct. 2nd Dist., opinion filed June 29, 1920.

The vital question in the case is was such negligence the proximate cause of the injury. An act to be the proximate cause of the injury must be ^a cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is the proximate cause if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury. For a full citation of the authorities on this question see Kanter v. St. L. S. & P. Ry., opinion filed April 21, 1920.

Appellee's crossing the street in violation of the ordinance under the circumstances of this case was one of the causes without which the accident could not have occurred at the time and place in question and under the authorities cited must therefor be ^{held} ~~xxx~~ to be the proximate cause of the accident and must therefor bar a recovery in this case. The judgment is therefor reversed.

FINDING OF FACTS.

We find that at the time of the accident appellee was violating an ordinance of the village of East Peoria, Illinois, and that such violation was the proximate cause of the injury and that appellee was guilty of negligence, which contributed to cause the injury.

L. & T.O. Co., New York, N.Y.,
pp. 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the accident occurred at the intersection of the street and the railroad tracks, and the plaintiff was injured by the defendant's car.

The plaintiff claims that the defendant was negligent in failing to stop the car in time to avoid the accident.

The plaintiff also claims that the defendant was negligent in failing to maintain the car in proper condition.

The plaintiff further claims that the defendant was negligent in failing to yield the right of way to the plaintiff.

The plaintiff seeks damages for the injuries sustained and for the expenses incurred.

The plaintiff also seeks damages for the pain and suffering caused by the injuries.

The plaintiff further seeks damages for the loss of wages and for the loss of the use of the car.

The plaintiff also seeks damages for the loss of the car and for the cost of repairs.

The plaintiff further seeks damages for the loss of the car and for the cost of repairs.

The plaintiff also seeks damages for the loss of the car and for the cost of repairs.

The plaintiff further seeks damages for the loss of the car and for the cost of repairs.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

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P-H 250
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6811

Ella Peterson,
Appellee,

vs.

Appeal from Peoria.

Peoria Railway Company,
Appellant.

Heard, J.

219 A. 636

This is an appeal from a judgment for \$7,500, which appellee recovered against appellant in the circuit court of Peoria County in a suit for personal injuries alleged to have been sustained by appellee while in the act of alighting from one of appellant's street cars upon which she was a passenger.

It is claimed by appellant that the evidence does not sustain any of the allegations of negligence contained in the declarations. The declaration consisted of four counts. In the first count the negligence alleged is that while appellee, a passenger on appellant's street car, with due care and caution for her own safety, was attempting to leave the car which had stopped at the corner of Adams and Walnut Street at the usual place for discharging of passengers, appellant, by its servants, so carelessly, negligently and recklessly drove and managed the car that by and through the negligence, mismanagement and unskillfulness of appellant's servants the car was, suddenly and without warning started, and, suddenly, without warning, stopped with a jerk while appellee was standing on the platform or steps of the car attempting to leave the same.

In the second count the negligence alleged is that while appellee was alighting from the car appellant's servants suddenly started the car without warning to appellee and by reason thereof appellee was thrown and injured.

In the third count the allegation of negligence is that while plaintiff was in the act of alighting the car was started

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without notice to appellee causing the car to jerk and by reason thereof plaintiff was thrown.

In the fourth count it is alleged that while appellee was about to alight from the car the car was caused to be suddenly and violently started and by reason thereof plaintiff was thrown and injured.

In actions of this character it is only necessary to allege and prove three things; (1) facts showing the existence of a duty on the part of the defendant to exercise care to protect the plaintiff from the injury of which he complains; (2) the failure of the defendant to perform that duty; and (3) an injury to plaintiff resulting from such failure. *N. S. C. Co. v. Fromm*, 286 Ill. 254; *Bahr v. N. S. D. Co.*, 234 Ill. 101. These three elements constitute the gist of the declaration and must be met by proof strictly conforming thereto.

There was evidence tending to show that the car stopped at the corner of Adams and Walnut streets, that appellee then left her place in the car, went to the back platform, took hold of the hand rail with her right hand, put her right foot on the first step below the vestibule floor of the car and was in the act of taking her left foot clear from the floor of the vestibule to the step, when without any warning, the car started up slowly in the usual manner of starting and went from six to twelve feet with her in that position when it suddenly stopped with a jerk wrenching and twisting appellee's body and causing a dislocation of her right knee.

The three elements above mentioned were averred in the first count of the declaration and the evidence above set forth strictly conformed to, and if the jury believed it, proved, these three essential elements of said count.

Appellant contends that appellee was guilty of contributory negligence in remaining in the position in which she was. It is only claimed that she remained in this position while the car travelled from six to twelve feet. It was a question of fact for the jury to determine from all the circumstances whether or not appellee exercised ordinary care for her own safety and we cannot say that

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the jury were not justified by the evidence in finding that she did exercise such care.

Appellant claims that the verdict was contrary to the weight of the evidence. While there is some conflicting evidence in the case there was evidence sufficient to sustain the verdict if the jury believed appellee and her witnesses. This they evidently did. Weighing the evidence is peculiarly the province of the jury and we would not be justified in setting aside their finding ^{there} in the case.

It is assigned for error that the court erred in allowing appellee's witness, Dr. Farnum, to testify that he believed that the likelihood was that appellee would have some permanent manifestations. Dr. Farnum, after testifying as to appellee's condition was asked this question; "Have you an opinion as to whether or not this condition is a permanent one?" Appellant objected that no foundation had been laid and as incompetent, irrelevant and immaterial and calling for a conclusion. The objection was overruled. The witness answered: "I would have you bear in mind that I saw this patient but once and it is a difficult matter for any physician to use the word 'permanency,' after a single examination. In my judgment, however--". Here the witness was interrupted and was asked the question: "What is your opinion?" The defendant objected because no foundation had been laid and as incompetent, irrelevant and immaterial. The court then said: "Objection overruled. He may answer with reference to the probable future consequences." Appellant's counsel then objected as follows: "We object as the probable consequences are too remote and not sufficient or definite enough to render the testimony competent. Testimony of probable results is not competent. The objection was overruled and the witness answered: "Then I would say, as I said before, that the matter of describing 'permanency' from a single examination is a difficult matter. I saw 3 this woman but once. I believe that the likelihood is that she will have some permanent manifestations." Appellant's counsel then objected to the answer as not competent, too remote and speculative and moved the answer be stricken. The motion was overruled. The evidence was not competent and should have been

the jury to not "let the law be a joke" and to exercise their duty.

and as indicated by the question, "What was the question?" "What was the question?" "What was the question?"

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1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

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was overturned. The evidence was not sufficient to establish that the defendant was guilty of the crime charged. The evidence was not sufficient to establish that the defendant was guilty of the crime charged. The evidence was not sufficient to establish that the defendant was guilty of the crime charged.

stricken out.

Here surmise or conjecture cannot be regarded as proof of future condition. Expert witnesses can only give their opinion as to future consequences that are shown to be reasonably certain to ensue. 17 Cye 226; C. C. Ry. Co. v. Henry, 63 Ill. 142; Lyons v. C. C. Ry. Co., 258 Ill. 75; Kimbrough v. C. C. Ry. Co. 273 Ill. 72; Almann v. C. C. T. Co., 243 Ill. 363; Luth v. C. M. T. Co. 244 Ill. 244; Filer v. Peoria Ry. Co. 200 App. Ill. 487; Ehrharit v. Conn. Fire Ins. Co. Ill. App. 2nd Dist. opinion filed June 29, 1920. We do not, however, consider this error reversible as Drs. Levitin and Kannapel both testified to the permanency of some of appellee's ailments and there was no evidence offered to the contrary by appellant.

It is claimed that the damages are excessive. Appellee at the time of the accident was about 35 years of age and had enjoyed good health prior thereto. Witnesses for both appellee and appellant testify that by the accident appellee's right knee was dislocated. This dislocation was pulled back into place by two men at the scene of the accident. Dr. Kannapel, her attending physician, testified that in the year and a half between the accident and the trial he had called upon appellee professionally 325 or 330 times, and that on each of these occasions he saw her, talked with her and examined her; that she had pain in the limb. There is evidence that there was a rupture or breaking of the spinal arteries along appellee's spinal cord, destroying the nerve tissues and that this was brought about by a sudden jerk or twisting of the body; that as a result thereof she has a partial paresis of certain flexor muscles of the forearm and hand; that she has certain areas of anesthesia, that the grasping ability of her right hand was greatly decreased in comparison with her left; that there was a paralysis of the center of urination in the spinal cord so that she could not hold her urine and urine would dribble from her; that she was unable to hold her neck in an upright position without wearing a support; that she suffered excruciating pain and that this

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condition was permanent. If these conditions existed as the result of appellant's negligence and the jury evidently found they did, we cannot say that the verdict is excessive.

The judgment is affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191A. 236

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Tillman Anderson, by
Christopher Anderson,
his next friend,

• Appellee,

vs.

Appeal from Grundy

Thomas T. Fletcher,

Appellant.

219 L.A. 336

Heard, J.

In August 1914, one R. F. Booth, being the owner of a farm in Kendall county, known in the evidence as the Murley farm, entered into a written contract with appellant to sell the same to him, possession of the premises and deed to be given March 1, 1915. In the fall of 1914 Elias Knudson, as tenant of appellant, did some fall work on the premises and on March 1, 1915, moved on and took possession of the same, and remained there on as tenant of appellant until after March 22, 1918. Subsequently to entering into the contract a dispute arose between Booth and appellant as to the number of acres in the farm and as to the amount of the purchase price. On June 25, 1915, Booth filed in the circuit court a bill against appellant for the specific performance of the contract which bill he afterwards dismissed. Knudson, as appellant's tenant worked the farm in 1915, 1916, and 1917, delivering to appellant one-half of the crops as rent, but up to March 22, 1918, appellant had not received a deed for the farm,

On the last mentioned day Booth and appellee, Tillman Anderson, whom Booth had hired for the purpose, went with team and wagon to the Murley farm, and after learning from the tenant where the oats, which had been grown on the premises the preceding year, were took these loads away in the wagon, one in the morning and two after dinner, delivering them to a nearby elevator.

Tillman in 1934

Christopher, who is,

his next friend,

vs.

Thomas T. Tillman,

Plaintiff,

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Hennepin, D.

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Appellant learning that the oats were being removed and taken to the elevator by Booth and appellee went to Yorkville, the county seat, and after talking about the matter with Clarence Williams, who was then Judge of the County court, but not a licensed attorney, went with him to the office of the Police Magistrate of Yorkville, where appellant swore out a warrant for appellee's arrest, charging him with larceny of the oats in question. Appellee was arrested by the Sheriff, bound over to the grand jury by the Police Magistrate and by the grand jury indicted for the larceny of the oats. A nolle prosequi was entered to the indictment by the state's attorney.

Thereupon, appellee, by Christopher Anderson, his father, as next friend, brought suit for malicious prosecution against appellant. A trial resulted in a verdict for appellee for the sum of \$10,000. Upon motion for new trial appellee remitted \$3500.00 and thereupon the court rendered judgment for \$7,500 in favor of appellee against appellant, from which judgment appellant had perfected his appeal.

It is contended by appellant that the judgment is manifestly excessive.

Appellee at the time in question was 18 years of age living with and working for his father a few miles from the Murley farm. He was familiar with the controversy between Booth and appellant concerning the farm. He knew that appellant had contracted to buy the farm and that Knudson as appellant's tenant, had taken possession on March 1, 1915, and had harvested for appellant the crops for the years 1915-16 and 17. Before starting to get the oats on the day in question his father had told them he would bet they would not get many oats, that appellant would stop them. While not guilty of larceny he was guilty of assisting in taking and selling the property of another without any warrant of law. He was not confined in jail, and was only in the custody of the sheriff for a few hours. No special circumstance of publicity, shame or humiliation are shown in aggravation of appellee's damages. He testified

that immediately after his arrest he felt weak and later was ashamed to meet people and that the case worried him. The sheriff testified that when he told appellee that he had a warrant for him appellee smiled and laughed. Appellee was put to an expense of \$350 in defending himself on the larceny charge and lost five days on account of the case in attending hearings and court and spent four or five days in preparing his defense.

When verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception of the case, a remittitur does not remove the prejudice, passion or misconception, as such elements may have entered into the finding of other facts important to the issue itself. *Lowenthal vs. Strong*, 90 Ill. 74.

Under the facts of this case we regard the judgment of \$7500 so grossly excessive as to require a reversal of the judgment. Some other alleged errors are argued by appellant in his briefs and arguments, but as most of these questions will probably not arise upon another trial and as appellant's counsel upon the motion for new trial when the trial judge said to him "I would be delighted and pleased if you have something on which you rely for reversal; if you would let me know what it is, and maybe I would change my mind", did not see fit to present these questions we do not deem it necessary to discuss them.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I. ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

11-17-20
6375

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 336

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6838.

John A. Russell,

Appellee,

vs.

Appeal from Kane.

Board of Education of District

Number 87 of Kane County, Illinois.

Appellant.

219 I.A. 636

Heard, J.

This is an appeal from a judgment for \$7,500.00, rendered by the circuit court of Kane county in favor of appellee against appellant for solicitors fees for service rendered in partition suit entitled Mercy Hospital, et al, vs. Board of Education of District No. 87 of Kane County, Illinois, et al, heard in the Superior Court of Cook County and taken by appeal to the Supreme Court, whose opinion therein is found in No. 281, page 582, to which opinion reference is made for a statement of the questions of law and fact therein involved.

There was no express contract between the parties as to the amount to be paid appellee for solicitors fees and the witnesses in behalf of appellee in addition to himself were four lawyers of Kane County, who gave their opinions as to the usual and customary charged for such legal services as appellee performed, such opinions ranging from \$7,000 to \$10,500. Appellant offered no evidence and requested no instructions.

At the request of appellee the court gave the jury the following instruction: "The jury are instructed to take the case and decide it according to your sworn consciences, remembering you are to find a verdict according to the testimony given you in the case. You are not to indulge in suppositions upon which no evidence has been given or offered. You have no right to trust your own opinion in the case, unsupported by proof. Jurors have no right to indulge in surmises or conjectures on subjects concerning which no evidence has been offered. They are bound to take the testimony for their sole guide."

Gen. No. 2853.

John A. Ford

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It is claimed by appellant that as the trial judge's testimony as to the value of the services was opinion merely, that this instruction required the jury to make a finding in accordance with such testimony and eliminated the jurors own independent knowledge, experience and opinions and was therefore error.

It has been frequently held that in fixing attorneys fees courts are not necessarily governed by the opinions of attorneys as to the value of such services, but that the court should exercise its own judgment based on its own knowledge and experience in such matters. *Goodwillie v. Milliman*, 56 Ill. 583; *Metheny v. Bohn*, 164 Ill. 495; *McMannery v. C. D. & V. R. R. Co.*, 167 Ill. 497; *Lee v. Lonax*, 319 Ill. 218; *Reineke v. Sanitary Dist.* 260 Ill. 380; *Gentleman v. Sanitary Dist.* 260 Ill. 317; *People v. Gilbert*, 283 Ill. 85. The reason for this holding is as stated in *Goodwillie v. Milliman*, supra, that the chancellor "has the requisite skill and knowledge to form some idea as to what is fair and reasonable compensation." In fact the chancellor is very frequently in much better position to form an expert opinion as to the reasonable value of the services than the witnesses testifying as experts. This reason does not, however, apply to a juror who has not had the requisite knowledge and experience to form an expert opinion. He would not be allowed to testify to his opinion as a witness, for the reason that the law holds him to be incompetent to form an opinion. The juror is sworn to decide the case according to the evidence and while it is unquestionably the duty of a juror to test the truth and weight of the testimony of the witnesses in the light of the juror's experience, observation and reflection and to consider the various motives which influence mankind, yet this duty should not give him the right to violate his oath and substitute for the sworn evidence his unsworn opinion which the law says he is not competent to form. While this instruction is inaccurate in some of its terms we do not consider its giving reversible error.

It is contended that the court erred in permitting the opinion witnesses to testify regarding the usual and customary charges

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see also points

for such services as were performed by appellee, without requiring such witnesses to base their opinions upon usual charges between parties competent to contract. The questions to appellee's witnesses should have been so limited. *Reynold v. McMillan*, 63 Ill.46; *McMannery v. C. D. & V. R. R.*, supra; *Gentleman v. Snitry Dist.*, supra; *People v. Gilbert*, supra, but this objection was not raised without any objection whatever and appellant therefore cannot raise the question here.

It is contended by appellant that the judgment is excessive.

It is not necessary for the purpose of this opinion to state in detail the particular services rendered appellant by appellee. The evidence shows that appellee is an attorney of ability and high standing; that the litigation covered a period of nearly three years; that appellee devoted services, amounting in the aggregate to three months, to the litigation; that two weeks of this time was consumed in a trip entitled to the income from \$150,000 worth of property.

It is claimed by appellant that the actual time devoted by appellee to appellant's interests was only three months than an allowance of \$7,500 would be the equivalent to an income from professional services of \$30,000 per annum and for that reason the judgment is excessive. It does not necessarily follow that an attorney's earnings for a year are four times what they are for a given three months, thereof, as even a first-class lawyer does not have a first-class case every day. Even if it did so follow, when we consider the much greater earnings of many men in other vocations, requiring less preparation, skill and ability, we can see no good reason why a first-class lawyer should not have a gross annual income of \$30,000 from his profession if the services he renders his clients are reasonably worth such a sum.

It is contended that the allowance of such a sum for an attorney's services is out of all proportion to the salaries paid to the judges of the circuit court. This is unquestionably true, but it is a matter of common knowledge that attorneys fees in general are at present time out of all proportion to the circuit judges salaries. In the

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home county of the writer of this opinion there are twenty-one lawyers in active practice of whom at least twelve have an annual income from their profession greater than the annual salary of a circuit judge. When we take into consideration the years of training, the requisite learning, their integrity and the great responsibility resting upon them it is a notorious fact that there is no class of our citizens as inadequately compensated as our circuit judges. Because a circuit judge is grossly underpaid is no reason why an attorney should not receive reasonable compensation if he earns it.

In the present case four attorneys of high standing at the Kane county bar, two of whom had been actively engaged in the litigation in which appellee's services were rendered, testified that appellee's services were reasonably worth from \$7,000 to \$10,500. Appellant did not introduce any testimony to the contrary. While it is true that there is a reluctance on the part of attorneys to oppose a claim for legal services yet if appellee's claim was grossly excessive, as claimed by appellant, out of the many attorneys of the Kane County bar and the thousands of attorneys in Chicago, where the partition case was tried, certainly some witnesses could have been obtained to have put a lower estimate upon appellee's services. While in our opinion the amount allowed is high, it is a matter of common knowledge that attorney's fees vary in different parts of the state and even in different counties of the same circuit. The evidence shows that fees are higher in Cook than in Kane county. The learned judge before whom the case was tried, and who heard the evidence and who from his local knowledge and experience in the allowance of solicitors fees, was entirely capable of forming and exercising an independent judgement on the question, approved the finding of the jury and rendered judgment thereon and we would not feel justified in setting it aside.

The judgment is affirmed.

home county of the writer of this opinion there are twenty-one lawyers in active practice of whom at least twelve have an annual income from their profession greater than the annual salary of a circuit judge. When we take into consideration the years of training, the requisite learning, their integrity and the great responsibility resting upon them it is a notorious fact that there is no class of our citizens as inadequately compensated as our circuit judges. Because a circuit judge is grossly underpaid is no reason why an attorney should not receive reasonable compensation if he earns it.

In the present case four attorneys of high standing in the Kane county bar, two of whom had been actively engaged in the litigation in which appellee's services were rendered, testified that appellee's services were reasonably worth from \$7,000 to \$10,000. Appellant did not introduce any testimony to the contrary. While it is true that there is a reluctance on the part of attorneys to oppose a claim for legal services yet if appellee's claim was grossly excessive, as claimed by appellant, out of the many attorneys of the Kane County bar and the thousands of attorneys in Ohio, where the partition case was tried, certainly some witnesses could have been obtained to have put a lower estimate upon appellee's services. While in our opinion the amount allowed is high, it is a matter of common knowledge that attorney's fees vary in different parts of the state and even in different counties of the same state. The evidence shows that fees are higher in Cook than in Kane county. The learned judge before whom the case was tried, and who heard the evidence and who from his local knowledge and experience in the allowance of attorney fees, was entirely capable of forming an independent judgment on the question, approved the finding of the jury and rendered judgment thereon and we would not feel justified in setting it aside.

The judgment is affirmed.

STATE OF ILLINOIS, { ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6839.

Anna R. Keller,

Appellee,

vs.

Appeal from Rock Island

State Bank of Rock Island,

Appellant.

219 I.A. 636

Niehhaus, J.

This case was passed upon by this court at the October Term 1918, and in opinion filed February 8, 1919 the judgment of the circuit court of Rock Island county was reversed with a finding of facts. A certiorari was granted by the Supreme Court, and on review there, the judgment of this court was reversed, because one of the controverted questions of fact involved was not passed upon, and the cause remanded to this court to be again heard and determined. Keller v. State Bank of Rock Island 292 Ill. 553.

The Supreme Court summarized the facts disclosed by the record, to be as follows:

"On June 4, 1914, Mrs. Pearl I. Hawley, who had a savings account in the State Bank of Rock Island, went with her mother, Anna R. Keller, to the bank and had the account changed and a new book issued in the name of "Anna R. Keller or Pearl I. Hawley." the change was made because Mrs. Hawley feared that her husband might interfere with the account. The amount was \$1874.75, which was reduced by checks of Mrs. Hawley paid from time to time, and interest was credited semi-annually. Mrs. Keller never drew any checks against the account. Mrs. Hawley died January 18, 1917, and soon after Mrs. Keller, claiming there was a balance due on the account, demanded payment, which was refused, and thereupon she sued the bank in assumpsit. The bank defended on the ground that it had paid the whole amount on checks signed by Mr. Hawley. The trial resulted in a verdict for the plaintiff and a judgment for \$1059.74. The bank claimed to have paid this amount on a check of Mrs. Hawley which the plaintiff in error claims was not signed by her, or if it was signed by her, was materially changed without her authority before payment.

Gen. No. 639.

Anna E. Nelson

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ident.

Mrs. Hawley lived with her husband, William C. Hawley, on a farm near Ainsworth, Iowa. The contested check was written on a blank of the Commercial Savings Bank of Washington, Iowa, with a line drawn through those names and the words "Rock Island State Bank" and Rock Island, Ill., written above them. It was dated January 3, 1917, the payee was the Ainsworth Savings Bank, and its amount was \$1079.48. It was presented for payment by the People's National Bank of Rock Island on January 13, 1917. It bore the rubber stamp indorsements of the Ainsworth Savings Bank the Iowa National Bank of Davenport, Iowa, and the People's National Bank. Payment was refused, the check was stamped on its face "insufficient funds," and was returned to the Peoples National Bank. This bank returned it to the Iowa National Bank, which informed the Ainsworth Savings Bank by telephone that payment had been refused because of insufficient funds and the check was coming back. Stephens, the cashier of the Ainsworth Savings Bank, then authorized the Iowa National Bank to change the amount, which was done by L. G. Bein, assistant cashier of the Iowa National Bank, drawing a line through the amounts written in the body of the check and in figures in the margin and writing above them in red ink the amount \$1059.74. Bein also wrote on the back of the check the statement that the amount had been changed by that bank and was guaranteed to be \$1059.74, January 15, 1917. The check so altered was then deposited again with the People's National Bank and on January 16, 1917 was presented to the defendant in error and paid.

On the day the check for \$1079.48 was presented and dishonored the bank wrote a letter to Mrs. Hawley informing her that payment of her check had been refused because of insufficient funds; that her balance was \$1059.74 and that a check for that amount would be honored. Her husband testified that he showed her this letter but not that she read it or could have read it or was conscious, and that the next morning he went to the Ainsworth Savings Bank. There was no evidence of any statement made by Mrs. Hawley either at that time or when the check was signed. The plaintiff in error testified that Mrs. Hawley was unconscious from January 9 until her death, on January 18, and there is no evidence that she was not. Stephens, the cashier of the Ainsworth Savings Bank, testified that the check was first brought to him from Hawley with the name of the payee and the amount blank. Stephens wrote in the name of the payee and the amount, which he got from Hawley, who had him figure the interest on the account. Stephens then sent the check to the Iowa National Bank for collection, and when afterward informed by that bank that the amount was not correct he conferred with Hawley, and then told the bank that Hawley was willing for them to change the amount."

The Supreme Court found that there was two controverted questions of fact involved in the case, namely, first: Did the check bear the genuine signature of Pearl I. Hawley; and secondly, was the check materially altered after its delivery without her authority. This court found, that the check was the genuine check of Mrs. Hawley, but did not pass upon the question as to whether

it was materially altered without her authority after its delivery. And in connection with this phase of the case, the Supreme Court holds the law to be as follows:

"Where a person signs a negotiable instrument which is incomplete because the amount is left blank and delivers it for use, the custodian of the paper has implied authority to fill in the amount. *Merritt v. Poyden & Son* 191 Ill. 136. Accordingly, when the cashier of the Ainsworth State Bank, at the direction of William C. Hawley, wrote into the paper bearing Mrs. Hawley's name the amount of \$1079.48, the paper became her genuine check for that amount, as was found by the Appellate Court. It was not paid, but after its dishonor the payee caused the amount to be changed to \$1059.74. This made another and different check. There is no finding that this change was authorized by Mrs. Hawley or that this check was her genuine check. When she gave her check in blank she gave the custodian implied authority to perfect the check by filling the blank. There is no evidence of any other authority than that implied by law. Hawley perfected the check by causing the blank to be filled. This was in accordance with his implied authority and Mrs. Hawley became bound by the check. He was not, however, authorized to bind her by another check. He had made the check which he was authorized to make, and he could not make another without further authority.

Counsel for the defendant in error refer to cases holding that the holder of a negotiable instrument indorsed in blank may correct the contract which he has written above a blank indorsement, even as late as the trial. It is true that a blank indorsement on a promissory note which has been filled up to state the contract incorrectly may be corrected so as to state the contract correctly, but in the present case the blank was filled in accordance with the authority ~~xxxxxxx~~ of the agent and became by that act binding on his principal, as the Appellate Court has found. He could not without other authority bind her by another check."

The finding of fact made by this court concerning the genuineness of the signature of Mrs. Hawley, and the conclusions drawn from the evidence in that regard are not disturbed by the decision of the Supreme Court, and on reconsideration of the case our conclusion remains the same on that question. We have carefully examined the record, but find no evidence of authority for the alteration of the check after it had been filled out, and presented to appellant for payment. An effort was made by the appellant on the trial to show authority by Mrs. Hawley to her husband, by attempting to prove a conversation, which it was claimed Mrs. Hawley had with her husband at the time he claims, he called his wife's attention to appellant's letter, notifying her of the refusal to pay the check

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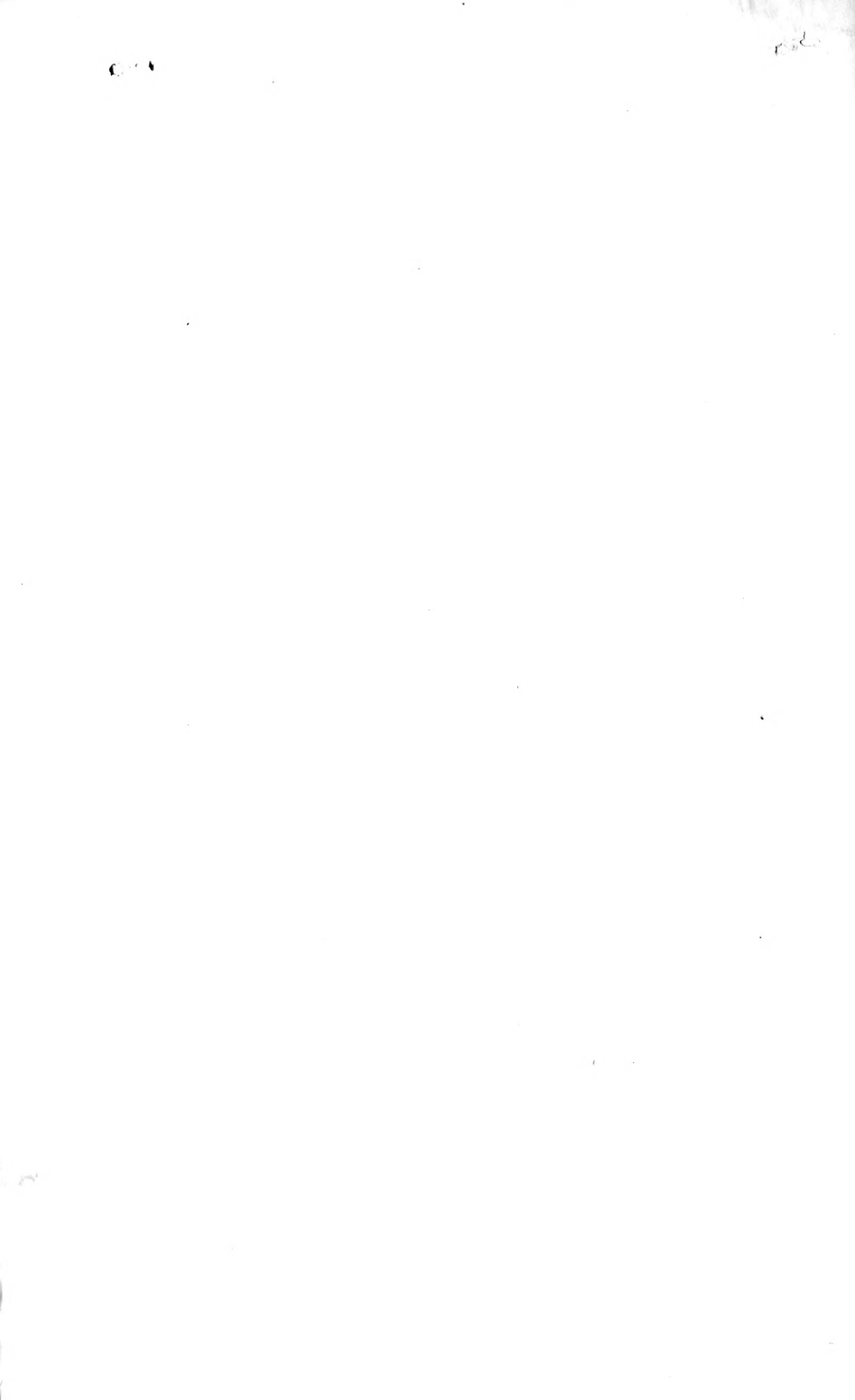
on account of the amount inserted therein being in excess of the deposit. The trial court refused to allow the husband to testify to this conversation, and error is assigned on this ruling of the court. We are of opinion that the conversation was not admissible as evidence, and there was no error in this ruling of the court. *Mahlstedt v. Ideal Lighting Co.* 271 Ill. 154; *Monaghan v. Green* 265 Ill. 233; *Shreffler v. Chase* 245 Ill. 395. The evidence of a material alteration of the check in question is clear and not disputed; payment of the check by the appellant was not available as a defense to the action, unless authority to make the alteration was shown. No authority having been proven it follows, that the verdict and judgment is right; and it is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



Opinion Modified
P-H Dec 1-2-10

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

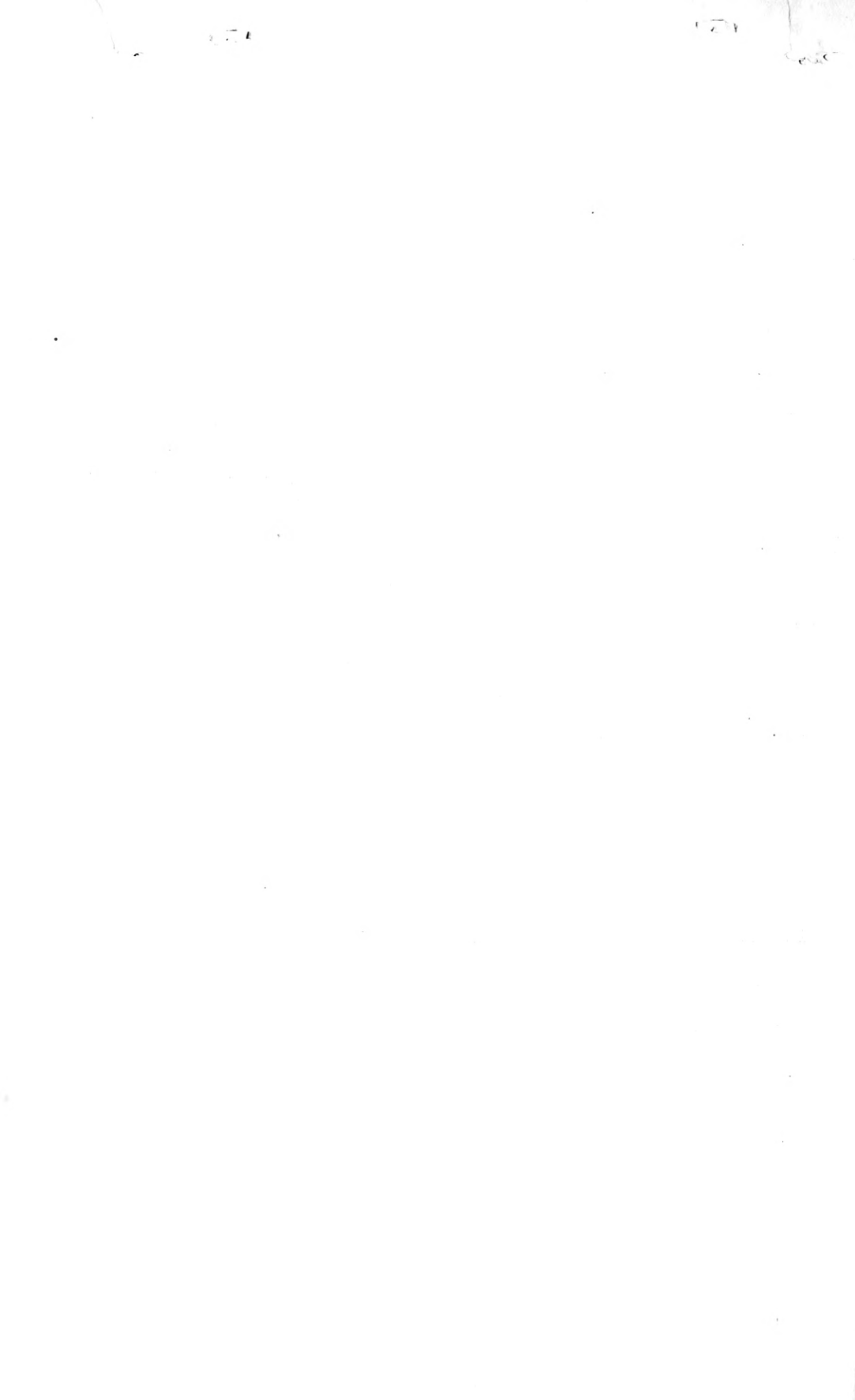
Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 636

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6742.

Agenda 48.

Herbert Hammond,

Appellant.

vs

Appeal from Kane.

J. W. MacDonald,

Appellee.

2191.A. 636

Niehaus, J.

In this case the appellant, Herbert Hammond, brought suit in assumpsit against J. W. MacDonald in the circuit court of Kane county. The suit is to recover \$1750.00 claimed to be due on a promisory note which the appellee had given to the Union Agency Company, a corporation, in payment of 100 shares of capital stock of that company. The appellant filed an affidavit of claim with his declaration, claiming the amount due to be \$1553.90; and it was afterward stipulated by the parties, that there was due on the face of the note, and according to the averments of the affidavit and claim, the amount mentioned. An affidavit of meritorious defense was filed by the appellee with his pleas, which alleged that the note in question had been obtained from him by means of fraud and false representations; and that the appellant had notice of that fact before he purchased the note in question. There was a trial by jury on the issues involved, which resulted in a verdict and judgment in favor of the appellee and this appeal is prosecuted from the judgment.

Appellant contends for a reversal of the judgment on several grounds, namely, that the trial court admitted incompetent evidence for the appellee; and that upon the evidence admitted, the court should have directed a verdict for the appellant. We

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Herbert Norman

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by the parties, and the Court, in its opinion, stated that the parties had agreed to the following:

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evidence for the case; the evidence is not sufficient to establish the case.

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are of opinion that the court properly refused to direct a verdict in the state of the evidence at the close of the case. It is clear, however, that there was evidence admitted, which should have been excluded. The account books of the Union Agency Company were admitted in evidence, without competent preliminary proof, of their correctness, or authenticity; nor does the record contain any competent proof to show, that the books were correct or made in the regular course of the business of the Union Agency Company; or that they contain a true record of the business transactions of the company. The only proof contained in the record in that regard is hearsay evidence; and consists of statements testified to by the witness Harvey Gursel who was also allowed to state an indictment had been procured against the company as a result of his investigation. The evidence which was improperly admitted, was clearly judicial to the rights of appellant. A question is raised by the appellee concerning the bill of exceptions, namely, that Exhibits 1 to 9 inclusive were not in the bill of exceptions when the same was presented to the trial judge on September 23, 1919. It appears however that these exhibits were incorporated into the bill of exceptions before it was signed and sealed by the judge nunc pro tunc on March 3, 1920. This was sufficient to make the exhibits a part of the record. *Madden v. City of Chicago* 283 Ill. 165. For the reasons stated the judgment is reversed and the cause remanded.

re of opinion at the about the state of the evidence in the state of the evidence, however, that there are evidence, admitted in evidence, correctness, or authenticity, or extent proof to show, that the regular course of the business of the company that they come in a more regular company. The only proof contained in a hearsay evidence; and, in the testimony of Harvey Gurnel who was also a witness, and been produced against the company, the evidence which was introduced in the rights of appellants, and the ruling the bill of exceptions, and the evidence were not in the bill of exceptions to the trial judge on a motion, and these exhibits were introduced and was signed and sealed, and this was sufficient to make the City of Chicago 289 Ill. 199, and the cause reversed.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss.

I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6788

Robert Lundstrum,
doing business as
Sterling Floral Company,
Appellee

vs

Appeal from City Court
City of Sterling.

Illinois Northern
Utilities Company
Appellant

219 I.A. 637

Niehaus, J.

This case was before us at a previous term on appeal, and the first judgment recovered by the appellee Robert Lundstrum against the appellant Illinois Northern Utilities Company, was reversed, and the cause remanded for another trial. Lundstrum v. Illinois Northern Utilities Co. Ill. App.

The facts now presented by the record are substantially the same as recited in the previous opinion; Robert Lundstrum the appellee, owned a greenhouse in the city of Sterling; and the appellant owned and operated a gas plant in that city; one of its pipes or mains was located in the street adjacent to his greenhouse. In January 1917 some of the plants which appellee was raising in the greenhouse appeared to be stunted and some died. About January 4th following, the appellee concluded that the trouble was from escaping gas, and reported the matter to the appellant; and it sent, out men to look for leaks in its mains. One was found about 50 feet from appellee's building, and was thereupon fixed. This action was sought to recover for the injury caused to appellee's plants, and the declaration charged that the defendant carelessly and negligently permitted its gas mains at the place indicated to get into a defective condition, permitting gas to escape, and averring that the ground became frozen and covered with ice so that the gas found

Gen. No. 8783

Robert Lundström,
John Lundström
Sterling Lundström

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U.S. DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY

Wieder, J.

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an underground channel from the place of the leak to the green house; and there arose to the surface, destroying some plants and injuring others. The case was reversed principally on the ground that there was no evidence of negligence, the appellee having tried his case upon the assumption that the doctrine of *res ipsa loquitur* applied; and offered no proof to show the negligence charged. The case has been tried again in the court below without a jury; and there was a finding and judgment for the appellee for the sum of \$2130.00 and this appeal is prosecuted from the judgment.

It is now contended that the judgment should be reversed because the charge of negligence made by the appellee in his declaration is not sustained by the evidence; also that incompetent testimony was introduced over the objection of appellant. The evidence tends to show, that there was a gas leakage from appellant's main, which had been laid in the street, in front of appellee's premises at a point where a service pipe has been joined and attached to the gas main. Appellant's main was laid 28 inches below the surface of the street; and not below the frost line; and under these circumstances the frost action would be likely to effect the joints, which were not expansion joints. The evidence tends to show that the frost action on the soft metal of the joint in question probably loosened it, and caused the leak. Furthermore that proper construction, required a block of wood or stone to be placed under the main at the joint to hold it firmly, and to prevent settling, and to minimize the effect of the freezing and thawing of the earth, around the joint and main, and the expansion and contraction resulting therefrom. It also appears from the evidence that in 1916, which was the year previous to the time of the injury, that there was a sudden increase in the amount of loss of

gas from the mains, which indicated that there might be a leak in the mains; and the extent of the discoloration of the soil next to the leakage also indicated, thatt the leak which was found, must have existed for a long time previous to the month of January 1917 when the injury was caused. In this state of the evidence the court was justified in concluding , that the appellant has sufficient notice to put it upon inquiry concerning leakage; and that when the matter of the sudden increase of the amount of gas lost from its mains came to its attention, in the exercise of reasonable care, the appellant should have made an inspection of its mains in the customary way to discover leaks; and that it could have done so before the ground became frozen. It is a reasonable inference from the evidence, that if such inspection has been made in the usual and ordinary way, the leak would have been discovered and the injury thereby prevented. We are of opinion, that there is a sufficient basis in the evidence for the finding of the court on the question of negligence. It is contended, that the court erred in allowing the appellee who was a witness in his own behalf, to answer over appellant's objection, questions concerning the amount of his damages, because, it is insisted that the questions contains some elements which are not competent to be considered on the question of damages, in addition to the elements in the question which are proper to be considered. It is a sufficient answer to this contention, that the objection which was made to the question on the trial, was not on this ground; the elements now claimed by counsel to be improperly in the question, should have been pointed out to the trial court, so as to give the trial court an opportunity to rule on the objection and to give appellee an opportunity to amend his question leaving out the objectionable elements in the case the objection were sustained. Now having made the objection

gas from the mains, which, in fact, was the cause of the explosion; and the extent of the damage done to the mains; and the leakage also indicated, that the leakage must have existed for a long time previous to the explosion, namely, early 1917 when the injury was caused. In this case, the court was justified in concluding, that the appellant has sufficient notice to put it upon inquiry concerning leakage; and that when the matter of the alleged increase of the gas lost from its mains came to the attention, in the exercise of reasonable care, the appellant should have made investigation of its mains in the customary way to discover leakage; and that it should have done so before the ground became frozen. It is a reasonable inference from the evidence, that it such investigation had been made in the usual and ordinary way, the leakage would have been discovered and the injury thereby prevented. We are of opinion, that there is a sufficient basis in the evidence for the finding of the court on the question of negligence. It is contended, that the court erred in allowing the appellee who was killed in the explosion, to answer over appellant's question, questions which the court of his damages, because, it is in fact, the question contains some elements which are not relevant to the question of the question of damages, in addition to the question of the question of the question of damages. It is contended, that the question of the question of damages, was not on this ground; the question was claimed by counsel to be improperly in the question, which was then put out to the trial court, so as to be put to the trial court to rule on the objection, and to have the question put to the court, and his question leaving out the question of the question of damages the objection were sustained. The question was sustained.

in the court below, it cannot now be considered as a ground for reversal. We are of opinion, that the proof concerning the damages which the record discloses is substantially within the limitations fixed by this court in the previous opinion, and is legally sufficient to sustain the amount found by the court. The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.

in the court below it cannot be said that the record is
reversible. We are of opinion, however, that the record is
sufficiently clear to show that the error was not
prejudicial to the defendant. The record is
therefore affirmed.

STATE OF ILLINOIS, ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



R/H Bui

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

[Faint handwritten notes and signatures, possibly including "Dorrance Dibell" and "John M. Niehaus"]



Gen. No. 6308.

Ethel G. Pattison,

Appellant,

vs.

Appeal from Carroll.

~~Douglas~~ Pattison,

Douglas

Appellee.

219 I.A. 637

Niehaus, J.

The facts in this case appear from the averments in the pleadings and the evidence. The appellant Ethel G. Pattison obtained a decree for divorce against the appellee Douglas Pattison at the November Term 1911 in the circuit court of Carroll county; and in the decree there is a provision for alimony based upon the agreement of the parties, which required the appellee to pay the appellant for her support and the support of the minor child of the parties, Nancy, the sum of \$150.00 monthly. After the entry of the decree, appellant with Nancy moved to California and took up a residence there. The appellee complied with the terms of the decree for alimony until the matters arose, which are involved in this controversy. After removing to California, the appellant put Nancy into a convent school for girls at San Rafael, California, an institution conducted by the catholic sisters of Dominican order; and Nancy remained at this school for several years; and was still in the school in the year 1918, when the appellant came to the conclusion that Nancy was developing a desire to become a nun, which she thought came from the religious influence surrounding her. She felt that this desire should be checked, but also concluded, that she did not have sufficient influence over her daughter to check it, and therefore called upon the appellee for his assistance in the matter. Her

Gen. No. 1008.

Ethel G. Patterson,

et al.,

vs.

Douglas Patterson,

et al.

1917

Nichols, J.

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of Garfield County, California
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Girls of San Francisco, California
catholic sisters of California
school for several years
1918, when the school was
developing a system
the religious instruction
should be given, and the
ficient influence over the
called upon the organization for

views on this subject at that time were particularly stated in a letter which she wrote to the appellee on June 14th, 1918; and which is as follows:

Dear Douglas:

I would not write to you now if I did not so earnestly desire what will be best for Nancy's welfare and I hope you will read this letter in the spirit I write it, with no other thought except for that will be best for Nancy and whatever you decide I shall try to feel will work out for her happiness.

In the first place I want to say something in regard to my relations with Nancy. I know now, in looking back, I have never given Nancy the tender mother love which a child has the right to expect and which most children get. She was never first with me. I have been absolutely and utterly selfish all of my life I can remember about, and it has only been lately I have begun to realize understandingly what a useless wasted life I have led.

When I put Nancy in the convent I shirked the responsibility of trying to cure myself with un-failing love her tendencies towards dishonesty and untruthfulness.

It is true I expected to live with her after her year in the convent, but by that time, she had grown to love the peace she found there and which had never been with me in my association with any one, and she refused to live with me, saying she would write to you to go under supervision if I did not allow her to go back. Each succeeding year, even when she came back from Freeport she has held this same threat over me, and I, (thinking I was too sick and wretched to work, and too lazy to earn my own living in the only ways open to untrained labor) if she did take that course allowed her to go back.

Now as to the result, which I alone am responsible for. There is a Sister Mercedes whom Nancy loves and respects beyond all people. She does not love either you or I. She did but she feels we have both failed her, and she is no longer a child who does not understand. Sister Mercedes gave her the attention, care and love, her poor baby heart was so hungry for, Nancy has graduated with the highest honors in the school and she is gifted beyond most girls. As Joan D'Arc, she gave a simply marvelous presentation. The sisters all realize her gifts and her brain, as do the priests who are always about the convent. It made my heart sick to see them with Nancy the day she graduated.

Nancy at first refused to spend this vacation with me although she knew I had been very sick in a sanitarium and had just come from there. She said she wanted to stay at the convent.

She is absolutely influenced by the sisters and Sister Raymond, the sister superior, told her to come to me after I had said I would send Nancy back for
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towns on this subject. I have written a letter which is as follows:

Dear George:

Now that I am not so busy, I have time to write you. I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy.

In the time of the I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy.

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I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been thinking of you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy.

this coming year. I said it to gain time - Sister Raymond had brought her to see me at the sanitarium and Nancy had told me she intended to go back to Dominican another year and to become a nun.

It is a generally understood thing among the sisters, priests and girls at the school that Nancy is to become a nun. It is not the mere fancy of a child, as this desire so often is, with convent girls, but it is Nancy's true aim and ambition. I would not feel adverse to her going to the school another year and of her becoming a Catholic, for she could be just as good a Catholic as a Protestant woman, but it is the knowledge of what another year or two there will do in strengthening her determination to become a sister and her never having known any good or real happiness beyond that found within the restricted life of the cloister.

She has never had a chance to know by comparison with healthy girlish happiness if she would still choose what is at best the unnatural way of living the sisters have, although they are lovely, good women and have taught Nancy all that she herself knows of goodness but I want her to have the chance. I want to get her away from their absorbing influence and let her get out among girls who live normal lives, and if, after having experienced that, and it is yours and my duty to see that she does, if then she with more mature knowledge and her own uninfluenced mind wishes to join the order she will do so with a clearer perception of what it will mean.

A year ago a fresh water college course of three years was added to the convent. You will notice in the Year Book there was but one graduate. Nancy, in addition to her four years of high school work, has done one year of that course. Sister Raymond wants her to come back to finish but Douglas that is not the real reason. The real reason is this: In two years' time Nancy will be eighteen and by law her own mistress and the Sisters and zealous priests want to make a nun out of this brilliant girl for the glory of their own church.

Sister Mercedes who is the teacher of literature is a remarkable woman of great strength and personality, and she believes implicitly that Nancy has genius, not talent, but genius, for writing and in the Dominican Order a nun is allowed to write. I sent you her poem in last year's book. Do you not see how different in thought and spirit her power in this year's book is and yet I feel that her first is more true poetry, the second is a desire to write for the church.

A few days ago I found a letter from sister Mercedes, she and Nancy write to each other every day, but Nancy does not want me to know it, and she never says she receives a letter. She treats me as a tolerated stranger but I feel it is what I deserve.

In this letter which was full of love and praise, she told Nancy that this coming year she would personally instruct her in the true faith and that at the end or during the year her happiest day would be when Nancy became a Catholic.

Nancy for a year now has told me she expected to become a nun. She has a rosary and says she prays to saints and is simply inoculated with the Catholic religion - and intends to join their church this coming year. She has already made retreats. I have found her reference and schedule of them full of two weeks of long fasting and

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parayer and she at that time fourteen and fifteen years old.

The day of commencement I met a woman, a Mrs. Sterly who is an intelligent woman. She used to be on a newspaper in New York. She has two daughters in the convent, and for a time she lived in the convent herself - in order to take a course from Sister Mercedes and she likes the school and the nuns, but this is what she said - "Mrs. Pattison, are you going to allow Nancy to come back next year," I said Nancy wanted to. And she said, "Oh what a wasted lost life if you don't get her away from this narrow nunnery. She has the most promising mind and the most ability of any girl I have ever known, and I have learned to know Nancy very well. All her promise will become simply an expression of the Catholic faith, for if she stays here the sisters will make her a Catholic and a nun and that means her gift of writing will be turned to their own use - What Nancy needs is a big free school where her mind and character will develop so that these wonderful gifts she possesses may be turned into broader channels - than simply writing Catholic tracts and for their own periodicals."

If you will, only realize how I feel about everything. Nancy has never had a real chance, neither you nor I ever gave it to her. We have given her things, and paid her bills, but after all that is all - I do not know if you will take the trouble to ever read this letter, but there is a grave responsibility resting about us. I at last realize it, I hope it will be in your heart to also realize it. Is Nancy's young almost unfelt life to be swallowed up in the life of this convent and the future life of the sisterhood? That is what her going back will mean because she is as plastic as soft clay in the hands of these women she loves ~~xxxx~~ and trusts so much. Is this going to happen without her having a chance for something different.

If she would go to a college in the east away from this influence altogether for four years (and she would pass any examination for entrance) then at the end of that time when she is twenty-one if she still desires to become a Catholic and a nun she will at least have had a chance of knowing something besides the life of the convent. She thinks, poor child, that the only peace and happiness she wants is to be found there - She judges other life as she has found it when there was the discord which was in her early home.

Now this is what I hope you will do. If you will send Nancy to Smith or Wellesly or some democratic college not in a city where the Catholic influence would be more apt to follow her, and where you will be reasonably sure she would not be approached by the priests, and the day of commencement the place was filled with priests and they all made so much of Nancy, even Arch Bishop Hanna had a private talk with her. Nancy thought it an honor but I saw in it as she told me of it, his method of planting his desire for her conversion in her mind. If you will send her to some college I will never ask you for any more money after she is started in college and I will sign a paper to that effect. I make only one stipulation and that is that I may help in the selection of the school, the school to be within the means you are able to accord, and I first of all desire Smith, then Wellesly.

I have never wanted to come back to Freeport

but it has seemed lately as if that was all I could do, and although I dread it I will come back and live with my mother. I will sew and I know I can earn enough to keep me. I will never by any work or deed say or do anything to reflect on you or yours and I will live quietly and hopefully - It has taken much suffering and I would nevertell what agony of mind to bring^{ing} to this, but at last the mother in me is more than anything else in the world and I want my child to have her chance. If you do this, if you write and say that you will not consent to her going back another year, that you have other plans for her, Nancy will refuse to leave and great pressure will, I think be brought to bear from the sisters and possibly some of the priests for they are determined to have her, but she is as yet only sixteen and as a lawyer you would know what to do and in two years in a normal healthy atmosphere she may change. Dominican opens the 8th of Aug. and Nancy is going back by the 1st she says. Whatever is done should be done by then. I have not nor will I tell her of this letter for she must not be antagonized any more than I can help.

Sister Raymond told me once that after Nancy had finished the college course at Dominican she wanted her to take a course at Berkely, but I feel pretty certain this was what was in the minds of Sister Mercedes and Sister Raymond.

"At the end of next year Nancy will have joined the Catholic Church. She will be seventeen, nearly eighteen. If her father and her mother (who does not count) refuse to let her come back it will only be a short time before she will be eighteen and can choose for herself. If an education under our (sister's) influence is not available she can enter the noviate when she is eighteen. On the other hand after a few more years here she will have joined the church and will be so filled with the Catholic faith that we would trust her for a course at Berkely when she would be close to our influence, for the more education she acquires if it is planted upon her belief in the Catholic religion the more it will become here as a nun.

I do not want her to go to Berkeley or Stanford for she would still be under their influence out here. By this alone you ought to know that for the first time I have an unselfish interest for Nancy's good alone, for if she stayed out here I would perhaps come back and I love California.

Elizabeth Crain is going to Smith this fall. She is a wholesome minded girl and I wish Nancy could go there. I think Margaret Willis Pierson might be able to get her in when perhaps others might fail through her late application. Even if she does not go to school for another year I do hope you insist that she does not return to the convent and we will spend the year in Freeport or wherever you say, but I do not feel Nancy could be happy in Freeport or with me. If you consent or think of anything better I will be so willing to do under your guidance anything you think best. I wish you would write me and if you take this course of refusing to let her go back Nancy and I could come back to Freeport in the late summer and I will abide by whatever you decide and will never intrude on you in any way afterwards.

I only want what will be for Nancy's ultimate happiness and best interests. I know Nancy's and my life may always continue apart and I look forward to a great deal of disappointment and heart ache but I know that I will have the courage to keep on for I think only of Nancy. Won't you please write to me and tell me that you will see that Nancy does not go back?

Sincerely,

Ethel Pattison.

June 14th, 1918.

About the same time she wrote the letter to the appellee, the appellant wrote another letter of similar import to Mrs. Jennie Kryder, appellee's sister, who resided in California; and this letter contains substantially the same thoughts and fears concerning Nancy; and in connection therewith also contains certain statements concerning the matter of alimony.

The appellee did not receive appellant's letter until July 15th following, but immediately concurred in her suggestions about taking Nancy out of the sisters' school; and wrote to the appellant to that effect; in this letter he stated, that he thought they could come to some understanding about sending her to Smith's college, and asked her to wire him if she was still in the same frame of mind as when she wrote the letter. Upon receipt of this letter from appellee, the appellant wired him, that she was still in the same frame of mind; and thereupon appellee wrote another letter to the appellant, in which he stated among other things, that he had received her wire, and that he had just written Nancy telling her that he had decided to send her to Smith College, because he thought that Smith College was a better school for her than the just organized junior college at San Rafael could possibly be; and that he expected her to come east in two or three weeks at the longest; that he had also written the Dominican College at San Rafael, that Nancy would not return there because he was going to send her to Smith College. He also stated, in this letter, that if he could not get Nancy into Smith College, he would try to get her into Vassar or Wellesly; and assured the appel-

lant that he would take charge of Nancy and would pay all her expenses; and that in addition to this he would pay the appellant \$50.00 per month, and that Nancy should be started east as soon as possible. At the close of the letter, he makes the following statement: "My financial resources are about strained to the breaking point on account of the war, but I am satisfied that my sisters will help me out if necessary, as the matter concerns Nancy's welfare so importantly. I have written them today something of the matter. However I feel no matter what happens, we must get her out of this." Efforts were made to get Nancy into Smith college, and Wellesly and Vassar, which were of no avail; and arrangement was finally perfected by which Nancy was sent to Berkely, a protestant school in California; and Nancy spend a year at this school. After that she returned to Freeport with the appellant and then went to reside with her father; and he sent her to the Wisconsin University to complete her education. Appellant claims, that sending Nancy to Wisconsin University was without her consent, but Nancy testified, when she talked with her mother about the matter, that she made no objection thereto. The principal objection which the appellant afterwards urged was, that she did not like co-educational schools. The appellee testified, that he had expended at least \$900.00, to procure for Nancy suitable and pretty clothes, and for school expenses, and for Nancy's maintenance after she had come to live with him, in October 1919. She became of age October 9th, 1919: after finishing her education at the University of Wisconsin, she returned to the home of her father and has continued to reside with him since that time. In February 1920 the appellant filed a petition in the circuit court of Carroll county against the appellee for a rule to show cause why he should not be held in contempt of court for failing to pay the \$150.00 per month provided in the decree in the divorce proceedings.

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There was a hearing upon the petition and at the close of the evidence taken at this hearing, the court gave the appellee leave to file a counter petition for a reduction of the monthly allowance for alimony; the court took account of the payments made by the appellee, and the amount expended under the original decree, and found that there remained due to the appellant under the decree, a balance of \$400.00 at the time of the entry of the present decree; and required the appellee to pay that amount; the provisions of the decree concerning alimony were thereupon modified by reducing the amount to be paid to appellant to \$75.00 per month; and from this decree an appeal is prosecuted.

It is contended by appellant, that the court improperly allowed the \$900.00 credit, which was for money expended in appellee's efforts to get Nancy to change her mind about becoming a nun; a task which appellee undertook at the instance of appellant. It is also contended, that the court improperly modified the decree by reducing the amount of alimony. It is apparent that the amount which was originally fixed as alimony contemplated the support and maintenance of both the appellant and Nancy. When the appellant was relieved of the care and support of Nancy, this made a proper basis for an equitable readjustment of the matter. The amount fixed by the court in the readjustment does not appear to be unjust or inequitable, taking into account the changed circumstances brought about at appellant's instance and not only involving additional expenditures for appellee, but relieving the appellant of many expenditures and obligations concerning Nancy. We find no error in the court's finding of the balance due the appellant; and are of opinion that the \$900.00 credit was properly allowed to the appellee.

It is also contended, that the court erred in the find-

[illegible][illegible]

ing, that the contract which the appellant made with her solicitor concerning the fees to be paid for his services, in securing the alimony due for appellant, be cancelled, and providing instead for the payment to appellant's solicitor of the sum of \$325.00 for the services rendered by appellant's solicitor and for expenses incurred. While it is true, that the court was without jurisdiction in this case to cancel or abrogate a contract between the appellant and her solicitor, the solicitor not being a party to the suit, the court was clearly within the scope of its powers in fixing the amount of solicitor's fees which it deemed reasonable and just; and the cancellation and abrogation of the contract must be regarded as effective so far as concerns the rights and obligations of the appellee and in so far as the contract may conflict with the amount to be paid by him. But it is a sufficient answer to appellant's contention in this regard to say, that she was not injured by this cancellation order, and hence is not in a position to make it the basis for a reversal of the decree. We find no reversible error in the record, and the decree is therefore affirmed.

Decree affirmed.

Heard, J. took no part.

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STATE OF ILLINOIS,)
SECOND DISTRICT.) ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: on October
12, 1920, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Term No. 6810.

Maude Henning,

Appellee,

vs

Appeal from County Court
Peoria County

The Hanover Fire Insurance
Company of New York,

Appellant

219 I.A. 637

Niehaus, J.

This is a suit commenced by appellee in the County Court of Peoria County to recover upon a policy of insurance, issued by appellant covering certain household furniture and goods owned by appellee located in a dwelling house at Canton, Ill. A fire broke out in the room containing this furniture and damaged it. Appellee thereupon sold it, and then brought this action. The trial resulted in a verdict and judgment in favor of appellee for \$386.00, from which the appellant has appealed to this court.

One of the errors assigned by appellant is, that the court erred in permitting the introduction of a letter written by appellee's attorney, over the objection of the appellant, containing self serving declarations. This letter purported to give a list of the articles alleged to have been burned, and the fair cash market value of the articles; and certain statements concerning the state of preservation, in which they were found; and that there were high class goods; and could not be duplicated in the market for 33-1/3 percent more than the valuation appellee had placed upon them. It also contained a statement that the adjuster for appellant had indicated to appellee, that her loss amounted to about \$75 to \$80. To this letter a reply was received from appellant stating, that the matter of adjustment had been placed in the hands of S. P. Richmond; and that

Term No. 3310.

Marie Hennings

1911-12

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The Hanover Life Insurance
Company of New York

Admission

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Wichita, K.

This is a copy of a letter from the
of Peoria County to a copy of a letter from the
appellant covering certain matters. The letter
appellate located in a building located in the
out in the room containing the letter. The letter
thereupon sold it, and the letter was
in a variety of places. The letter was
which the letter was located in the
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he would give the matter the necessary attention. It was insisted by appellee, that the letter referred to, written by her attorneys, was competent as a foundation for the introduction of appellant's reply letter. But it is apparent that the reply letter of appellant which referred to the number of the policy, did not require for its introduction the self serving statements in appellee's letter; and it was error for the trial court to permit its introduction in evidence. Jewel Belting Co. v. Hamilton 257 Ill. 338; Razor v. Razor 149, Ill. 631; O'Meara v. Cardiff Coal Co. 154 Ill. App. 321, and Barnett v. Noble 155 Ill. App. 139.

Another error urged by appellant is, that the court refused to strike out incompetent evidence upon motion of appellant. Upon her direct examination, appellee had testified about the property which was in the room at the time of the fire. Upon cross examination it developed, that appellee had had these goods stored with a Mrs. Walker; and after renting the house wherein the fire occurred, instructed Mrs. Walker to remove the furniture into this house, and then went away on a visit. Appellee had never seen her property in the room in which it was stored; was not there at the time of the fire; and did not arrive there until four days after the fire. Appellant therefore made a motion to exclude her evidence on that subject, because it was hearsay, which motion was denied by the court. A party has a right to insist, that incompetent testimony shall be excluded; and whenever such testimony is admitted the court, should exclude it, and direct the jury to disregard it. Sailors v. Nixon - Jones Printing Co. 30 Ill. App. 515; Wickenkamp v. Wickenkamp 77 Ill. 92; C. P. & St. L. Ry Co. v. Blume 137 Ill. 451. This refusal of the court to exclude the hearsay evidence on appellant's motion must be regarded as reversible error.

It is further urged by appellant, that there is a variance between the proof and the declaration; but inasmuch as the declaration has not been abstracted, this question cannot be considered and must be regarded as waived. The appellant is required to furnish such a

he would give the matter in his hands. It was stated
by appeal, that the fact that the defendant was
was competent to testify. The defendant was
replied to the fact that the defendant was
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information to the fact that the defendant was
it was error for the court to have admitted the
evidence. The defendant was not competent to
Ill. 631; 632; 633; 634; 635; 636; 637; 638; 639; 640; 641; 642; 643; 644; 645; 646; 647; 648; 649; 650; 651; 652; 653; 654; 655; 656; 657; 658; 659; 660; 661; 662; 663; 664; 665; 666; 667; 668; 669; 670; 671; 672; 673; 674; 675; 676; 677; 678; 679; 680; 681; 682; 683; 684; 685; 686; 687; 688; 689; 690; 691; 692; 693; 694; 695; 696; 697; 698; 699; 700; 701; 702; 703; 704; 705; 706; 707; 708; 709; 710; 711; 712; 713; 714; 715; 716; 717; 718; 719; 720; 721; 722; 723; 724; 725; 726; 727; 728; 729; 730; 731; 732; 733; 734; 735; 736; 737; 738; 739; 740; 741; 742; 743; 744; 745; 746; 747; 748; 749; 750; 751; 752; 753; 754; 755; 756; 757; 758; 759; 760; 761; 762; 763; 764; 765; 766; 767; 768; 769; 770; 771; 772; 773; 774; 775; 776; 777; 778; 779; 780; 781; 782; 783; 784; 785; 786; 787; 788; 789; 790; 791; 792; 793; 794; 795; 796; 797; 798; 799; 800; 801; 802; 803; 804; 805; 806; 807; 808; 809; 810; 811; 812; 813; 814; 815; 816; 817; 818; 819; 820; 821; 822; 823; 824; 825; 826; 827; 828; 829; 830; 831; 832; 833; 834; 835; 836; 837; 838; 839; 840; 841; 842; 843; 844; 845; 846; 847; 848; 849; 850; 851; 852; 853; 854; 855; 856; 857; 858; 859; 860; 861; 862; 863; 864; 865; 866; 867; 868; 869; 870; 871; 872; 873; 874; 875; 876; 877; 878; 879; 880; 881; 882; 883; 884; 885; 886; 887; 888; 889; 890; 891; 892; 893; 894; 895; 896; 897; 898; 899; 900; 901; 902; 903; 904; 905; 906; 907; 908; 909; 910; 911; 912; 913; 914; 915; 916; 917; 918; 919; 920; 921; 922; 923; 924; 925; 926; 927; 928; 929; 930; 931; 932; 933; 934; 935; 936; 937; 938; 939; 940; 941; 942; 943; 944; 945; 946; 947; 948; 949; 950; 951; 952; 953; 954; 955; 956; 957; 958; 959; 960; 961; 962; 963; 964; 965; 966; 967; 968; 969; 970; 971; 972; 973; 974; 975; 976; 977; 978; 979; 980; 981; 982; 983; 984; 985; 986; 987; 988; 989; 990; 991; 992; 993; 994; 995; 996; 997; 998; 999; 1000

complete abstract of the records will fully present every error relied upon, and which is sufficient for the examination and determination of the matters in controversy without the examination of the record itself. Giler v. City of Mattoon 187 Ill. 18; People v. Yukskavskas 268 Ill. 323; Jackson v. Winans 287 Ill. 386; St. L. A. & T. Ry. Co. v. Holman 58 Ill. App. 633; Barber v. Mellish - Hayward Co. 209 Ill. App. 299.

Another point urged by appellant is, that the damages are excessive, and are not based upon competent evidence. Appellee over the objection of the appellant, sought to show, as the measure of damages, the difference between the fair cash market value before the injury and the fair cash market value after the injury. The authorities have been fully collected, and discussed at great length on this point in the case of McDonnell v. L. E. & W. Ry. Co. 208 Ill. App. 442. The rule is there laid down, that where personal property has been injured and can be repaired, the proper measure of damages is the cost of the repairs; but if it cannot be repaired, then the measure of damages is the difference between the fair cash market value of the property before the injury, and the fair, cash market value after the injury. In the case at bar, many of the goods were injured beyond repair. It was incumbent upon appellee in the first instance to prove that these goods were damaged beyond repair, or if they were capable of being repaired to prove the cost of such repairs. After the fire appellee sold many of the articles and gave credit to appellant for the total sum she received therefor; but the evidence does not show whether she received what the property was reasonably worth, nor whether it was capable of being repaired; and if so what would be the cost of repairing.

For the errors indicated the judgment must be reversed and the cause is remanded for another trial.

Reversed and remanded

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

(3050)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

- Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice
Hon. OSCAR E. HEARD, Justice
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

219 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

760 A. C. 18

a chattel mortgage securing the car, and the buyer paid the cash, and sent him away till a later day, described the chattel mortgage in Kane County and locked up the question of the character of Howard McDowell, and on the third or fourth day thereafter delivered to him the Hudson car. Some time thereafter, and presumably after the first note was due and was paid, Bower testified himself that the party to whom he sold the car was not Howard McDowell of Aurora, and he then caused a writ to be instituted which located this car in Peoria in the possession of Hancock of the Louis Beyer Company for him. Bower signed the title which was obtained from him by the man who did get it by falsely representing himself to be McDowell, and that this car was decided to have intended to be delivered to McDowell, and that the person who got it is deemed to have committed larceny of the property under Section 103 of Division One of the Criminal Code, and that therefore Bower has the same right to recover the car from any person in whose possession he may find it as if it had been stolen. The proof showed Hancock in possession as an innocent purchaser for full value.

Though plaintiff does not so testify, yet the chattel mortgage which he drew or caused to be drawn on May 7, 1918, and to be executed by the purchaser, described the purchaser as Howard McDowell, 311 Flagg St. Aurora, Illinois, and plaintiff must have obtained that location from the purchaser. At a later date another man came to him claiming to be Howard McDowell of Aurora, who denied that he had bought this car, and plaintiff testified that it was not the man to whom he sold it. Plaintiff had sent a registered letter directed to Howard McDowell at Aurora and the second man wrote him in answer to that letter. Plaintiff testified in chief that this second man did not bring the letter, but in rebuttal testified that that man did bring the letter and that he himself read it. Plaintiff testified that the second man also showed him the title registration card bearing the name of Howard McDowell and that he then had con-

verstation with the defendant, which he testified with the documents
convinced plaintiff that this person was Howard McDowell, of
Aurora. This is substantially all that plaintiff testified the plin-
tiff offered. He did not call McDowell nor prove by him or any one
that Howard McDowell lived or did not live at 1111 First Street, Aur-
ora. Plaintiff proved that Patterson, President of the Ajax Motor
Company, a concern in Chicago, told plaintiff that Lawrence Ayres
was the man who bought his automobile, and that he, Patterson, had
been to the home of Ayres and ascertained that fact. Plaintiff sent
an investigator to Aurora, who came back and reported about the things
to plaintiff. Neither Patterson nor the investigator were witnesses.
Plaintiff did not state the sum at which he accepted the Saxon car as
part payment nor did he testify but that he still had the Saxon car
or had sold it. He did testify that it later turned out that
the Saxon car belonged to the Ajax Motor Company but he did not obtain
claim to know that fact himself nor did he bring any witness to test-
ify thereto. He did not claim that he ascertained from Patterson
where Ayres lives nor that he tried to find Ayres and bring him as
a witness. He tried to introduce in evidence a letter purporting to
be signed by Ayres, admitting that he was the one who bought the Hud-
son car, but there was no proof to identify this letter, and it was
incompetent in any event. Plaintiff testified that he did not seek
to ascertain the identity or the financial responsibility of the pur-
chaser. Plaintiff took from the purchaser a chattel mortgage upon
this car to secure the notes evidencing the unpaid part of the pur-
chase money, but he did not have him acknowledge it. Plaintiff gave
the purchaser a power of attorney to Herman B. [redacted] and [redacted] said
instrument for the purchaser, but that power of attorney was not ac-
knowledgeed, nor did the attorney in fact acknowledge the mortgage.
Plaintiff filed the chattel mortgage and the next day [redacted]
under the statute concerning chattel mortgages, if it is to be acknow-
ledged where the mortgagor resides, and without such acknowledgment

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of the chattel mortgage. There is no doubt that in this record that the person who bought the car was this Hanson, it was not Howard McDowell, of the first story, upon, except that plaintiff afterwards sent a registered letter to that address and another man brought it in and showed it to plaintiff and showed him a registration card bearing the name Howard McDowell and had such a conversation with plaintiff that plaintiff concluded that he was Howard McDowell and not the first. The plaintiff did not object to most of the evidence we have recited, and it is not inconsistent. The court sustained numerous objections to this testimony, but still much of it remained in the record, and at least it was not a case for plaintiff. No reason appears why plaintiff did not become McDowell and Patterson in opposition to the first offer. He was allowed to recover upon the conclusions which he drew from statements made to him by persons whom he did not know, and it is not decided whether plaintiff's view of the law is sound, nor whether a seller of goods to a stranger on time is entitled to sue for the goods to identify the stranger in order to entitle the seller to retake the goods from an innocent purchaser for value. Proof of the facts should precede a discussion of those subjects.

Plaintiff argues that if the first offer was made to him, and if he is entitled to retake the goods, then he is entitled to it, the same as if it had been stolen, and the question is then upon instructions. We are of opinion that these instructions should have been refused because no such case had been made out by the evidence.

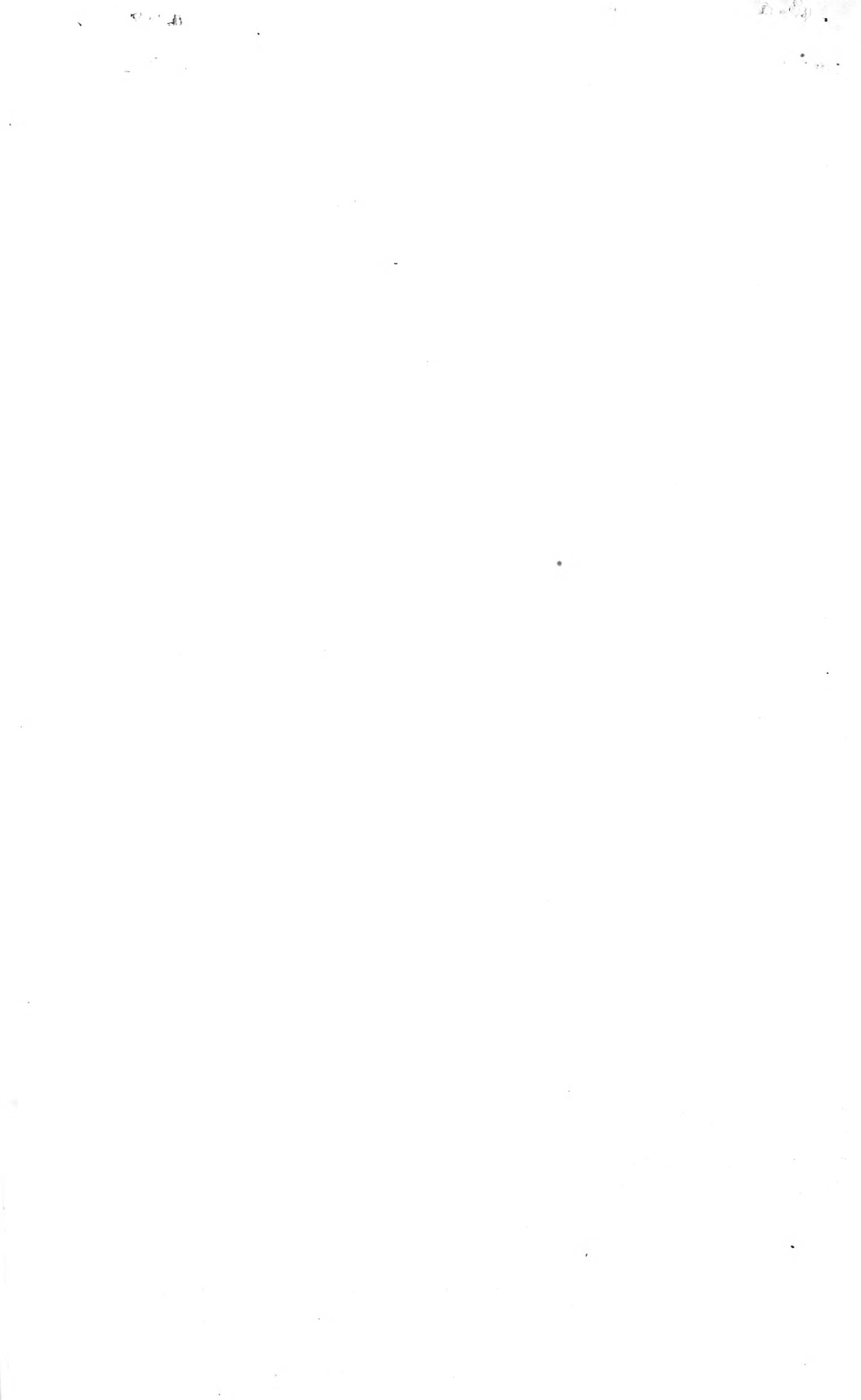
The judgment is therefore reversed and the case is remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:



Gen. No. 6884.

Floyd C. Schmitt, appellant,
vs.
Minnie W. Schmitt, appellee,
Minnie H. Schmitt, appellee,
vs.
Floyd C. Schmitt, respondent.

219 I.A. 637

Heard, J.

November 17, 1917 appellant and appellee, who are husband and wife, were married in 1914 and have lived separate and apart from each other. December 1, 1917 they entered into a written agreement whereby they agreed to continue to so live. The agreement was in full and each other - in it provided that appellee should have the custody and control of their two children; that appellant should pay a cashed mortgage upon the homestead which they jointly owned; that title thereto should be put in the children, with a life estate in the wife, and that appellant should pay appellee \$100 a month in some monthly installment for the support of said children, as long as she lived or until she died. It was also provided that the agreement was made without prejudice to any right of action which either of the parties had to a divorce. Appellant ~~complied~~ ^{complied} with all provisions of the agreement until May 15, 1930.

December 22, 1918 appellant filed a bill in the circuit court of Kane County asking for a divorce on the ground of desertion and asking for the care, custody and control of the two children. Appellee filed an answer thereto denying the desertion and in her answer set up the agreement of December 1, 1917.

February 2, 1930 appellee filed a cross bill for divorce

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separate maintenance set forth in the agreement. In 1900, the court from appellants bill of divorce, and the court's duty toward her and by reason of the fact that she had committed adultery.

The cross bill filed by the defendant in 1900, of appellees bill for divorce, and the court's agreement and that in view of such conditions the court ordered to declare the agreement null and void, and the cross bill denying all charges therein contained.

February 13, 1900 the court entered a decree in a amended bill of separate maintenance, and the court reported cruelty to which appellee will not deny, denying all charges of cruelty.

The charges in the bill of separate maintenance and cross bill are never mentioned in the court's decree. On June 3, 1900 the court entered a decree in the bill of separate maintenance costs and in the bill of separate maintenance was entitled to separate maintenance and ^{and} the court provided for such separate maintenance in accordance with the provisions of the agreement of December 1, 1899. It is provided that in the decree that in the court's bill of separate maintenance to the appellate court, ^{upon} the court's bill of separate maintenance of the ~~appellee~~ ^{appellant} would be paid by the court and the fees and expense upon the bill of separate maintenance, 1900, and the bill of his bond for an appeal from the decree.

It is contended by the appellant that the court is entitled to a decree of separate maintenance in the bill of her bill of separate maintenance and part from the court's equitable action agreement, and the court's bill of separate maintenance performed by him.

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To maintain an action for ~~separation~~ ^{divorce} ~~in~~ ⁱⁿ ~~the~~ ^{the} ~~state~~ ^{state} ~~of~~ ^{of} ~~Illinois~~ ^{Illinois} ~~the~~ ^{the} ~~husband's~~ ^{husband's} ~~wife~~ ^{wife} must show not only that she has ~~been~~ ^{been} ~~separated~~ ^{separated} ~~from~~ ^{from} ~~her~~ ^{her} ~~husband~~ ^{husband}, but also that such living ~~separation~~ ^{separation} ~~is~~ ^{is} ~~not~~ ^{not} ~~without~~ ^{without} ~~fault~~ ^{without} ~~on~~ ^{on} ~~her~~ ^{her} ~~part~~ ^{part}. Voluntary ~~separation~~ ^{separation} ~~constitutes~~ ^{constitutes} ~~such~~ ^{such} ~~fault~~ ^{fault} ~~within~~ ^{within} ~~the~~ ^{the} ~~meaning~~ ^{meaning} ~~of~~ ^{of} ~~the~~ ^{the} ~~statute~~ ^{statute} ~~Johnson~~ ^{Johnson} ~~vs.~~ ^{vs.} ~~Johnson~~ ^{Johnson} ~~133~~ ¹³³ ~~Ill.~~ ^{Ill.} ~~300.~~ ^{300.} Up to the time of filing his bill for divorce ~~appellee~~ ^{appellee} ~~had~~ ^{had} ~~complied~~ ^{complied} ~~with~~ ^{with} ~~all~~ ^{all} ~~the~~ ^{the} ~~terms~~ ^{terms} ~~of~~ ^{of} ~~the~~ ^{the} ~~agreement~~ ^{agreement} ~~to~~ ^{to} ~~be~~ ^{be} ~~performed~~ ^{performed} ~~and~~ ^{and} ~~had~~ ^{had} ~~appellant~~ ^{appellant} ~~filed~~ ^{filed} ~~his~~ ^{his} ~~bill~~ ^{bill} ~~for~~ ^{for} ~~divorce~~ ^{divorce} ~~and~~ ^{and} ~~for~~ ^{for} ~~the~~ ^{the} ~~custody~~ ^{custody} ~~of~~ ^{of} ~~the~~ ^{the} ~~children~~ ^{children} ~~he~~ ^{he} ~~in~~ ⁱⁿ ~~effect~~ ⁱⁿ ~~renounced~~ ^{renounced} ~~the~~ ^{the} ~~contract~~ ^{contract} ~~and~~ ^{and} ~~sought~~ ^{sought} ~~for~~ ^{for} ~~relief~~ ^{relief} ~~which~~ ^{which} ~~would~~ ^{would} ~~nullify~~ ^{nullify} ~~the~~ ^{the} ~~agreement~~ ^{agreement} ~~in~~ ⁱⁿ ~~some~~ ⁱⁿ ~~of~~ ^{of} ~~its~~ ^{of} ~~most~~ ^{of} ~~important~~ ^{of} ~~provisions.~~ ^{provisions.} The court had jurisdiction of the parties ~~and~~ ^{of the} ~~of the~~ ^{of the} ~~subject~~ ^{subject} ~~matters~~ ^{matters} ~~and~~ ^{and} ~~having~~ ^{having} ~~such~~ ^{such} ~~jurisdiction~~ ^{jurisdiction} ~~the~~ ^{the} ~~court~~ ^{court} ~~had~~ ^{had} ~~full~~ ^{full} ~~power~~ ^{power} ~~to~~ ^{to} ~~do~~ ^{do} ~~complete~~ ^{complete} ~~equity~~ ^{equity} ~~between~~ ^{between} ~~the~~ ^{the} ~~parties~~ ^{parties} ~~with~~ ^{with} ~~reference~~ ^{reference} ~~to~~ ^{to} ~~the~~ ^{the} ~~subject~~ ^{subject} ~~matter~~ ^{matter} ~~of~~ ^{of} ~~the~~ ^{the} ~~controversy~~ ^{controversy} ~~or~~ ^{or} ~~any~~ ^{any} ~~matter~~ ^{matter} ~~connected~~ ^{connected} ~~thereto.~~ ^{thereto.} Appellant having invoked the jurisdiction of the court over the subject matter of the agreement ~~asking~~ ^{asking} ~~relief~~ ^{relief} ~~from~~ ^{from} ~~some~~ ^{some} ~~of~~ ^{of} ~~its~~ ^{of} ~~provisions~~ ^{provisions} ~~cannot~~ ^{cannot} ~~complain~~ ^{complain} ~~because~~ ^{because} ~~the~~ ^{the} ~~court~~ ^{court} ~~took~~ ^{took} ~~complete~~ ^{complete} ~~jurisdiction~~ ^{jurisdiction} ~~over~~ ^{over} ~~it~~ ^{it} ~~and~~ ^{and} ~~on~~ ^{on} ~~appellee's~~ ^{appellee's} ~~cross~~ ^{cross} ~~bill~~ ^{bill} ~~ordered~~ ^{ordered} ~~him~~ ^{him} ~~to~~ ^{to} ~~carry~~ ^{carry} ~~out~~ ^{out} ~~the~~ ^{the} ~~terms~~ ^{terms} ~~of~~ ^{of} ~~the~~ ^{the} ~~agreement.~~ ^{agreement.} While this relief is not particularly prayed for by appellee it falls within the general ~~prayer~~ ^{prayer} ~~prayer~~ ^{prayer} ~~for~~ ^{for} ~~relief~~ ^{relief} ~~from~~ ^{from} ~~the~~ ^{the} ~~agreement~~ ^{agreement} ~~found~~ ^{found} ~~in~~ ⁱⁿ ~~this~~ ^{this} ~~cross~~ ^{cross} ~~bill.~~ ^{bill.}

It is contended by appellant that ~~appellee~~ ^{appellee} ~~by~~ ^{by} ~~misconduct~~ ^{misconduct} ~~on~~ ^{on} ~~her~~ ^{her} ~~part~~ ^{part} ~~materially~~ ^{materially} ~~contributed~~ ^{contributed} ~~to~~ ^{to} ~~the~~ ^{the} ~~separation~~ ^{separation} ~~and~~ ^{and} ~~that~~ ^{that} ~~therefore~~ ^{therefore} ~~she~~ ^{she} ~~is~~ ^{is} ~~not~~ ^{not} ~~entitled~~ ^{entitled} ~~to~~ ^{to} ~~separate~~ ^{separate} ~~maintenance.~~ ^{maintenance.} There is a very sharp conflict in the evidence as to whether or not she was guilty of misconduct. The chancellor who ~~was~~ ^{was} ~~the~~ ^{the} ~~sole~~ ^{sole} ~~finder~~ ^{finder} ~~of~~ ^{of} ~~fact~~ ^{fact} ~~and~~ ^{and} ~~law~~ ^{law} ~~in~~ ⁱⁿ ~~this~~ ^{this} ~~case~~ ^{case} ~~is~~ ^{is} ~~of~~ ^{of} ~~the~~ ^{the} ~~same~~ ^{same} ~~parish~~ ^{parish} ~~as~~ ^{as} ~~appellee~~ ^{appellee} ~~and~~ ^{and} ~~therefore~~ ^{therefore} ~~is~~ ^{is} ~~not~~ ^{not} ~~entitled~~ ^{entitled} ~~to~~ ^{to} ~~set~~ ^{set} ~~aside~~ ^{set} ~~his~~ ^{his} ~~findings~~ ^{findings} ~~of~~ ^{of} ~~fact~~ ^{fact} ~~and~~ ^{and} ~~law.~~ ^{law.}

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heard the evidence found by the doctor that the possibility
of such misconduct might be a result of the institution,
his findings.

The decree is affirmed.

1. The first step is to identify the problem.
 2. The second step is to analyze the problem.
 3. The third step is to develop a solution.
 4. The fourth step is to implement the solution.
 5. The fifth step is to evaluate the solution.

STATE OF ILLINOIS, } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.



1228a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

219 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: on

06 27 20 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 3820.

Rose Greve,
Appellee,

vs.

Robert Harris, Du Page Co., Ill.

Robert Harris,
Appellant.

219 I.A. 638

Nichols, J.

In this case Rose Greve testified against the appellant Robert Harris in the circuit court of Du Page county to recover damages for an alleged breach of a marriage contract. There was a trial by jury, which resulted in a verdict and judgment for \$3500 against the appellant; and this appeal is prosecuted from the judgment. The testimony of the appellee is to the effect, that the appellant, who is a farmer, residing on a farm near Bartlett in Du Page county, employed her as a servant in November 1911 to work for him as a housekeeper; and to help about the chores on the farm; that she continued to work for him in that capacity until July 31st, 1917; and that during the time she was in appellant's employ, he made love to her in various ways and promised to marry her; and afterwards seduced her under the promise of marriage. There is considerable conflict in the evidence between the testimony of the appellee, and of the appellant, with reference to the precise date of the seduction claimed by her; and the direct proof concerning these matters is confined to the testimony of the parties to the controversy, and was largely questioned as to the truth by these parties told the truth.

The main ground urged by appellant for reversal of the judgment is, that some of the instructions given for the

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Rose G. H. H. H.

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Robert H. H. H.

Wichita, J.

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Appellee didn't not correctly state the law in the instructions which in effect directed verdict in favor of the defendant involved in the controversy, which was sustained by him as a defense to the action. The instructions which were pointed out as erroneous are No. 3, No. 4 and No. 5 given for the appellee. In Instruction No. 3 the jury were told, that if they believed from a preponderance of the evidence, that the appellant entered into a contract to marry the appellee, at the expiration of three years; and that at the expiration of three years the appellant failed the appellee to marry her; and that the appellant "without justifiable cause failed and refused so to do" that their verdict should be for the plaintiff. There is nowhere in the instructions any definition of what is meant by justifiable cause. What constitutes justifiable cause for a failure or refusal to marry, but marriage contract is a question law; but under this instruction it was left to the jury, to determine what would be, or would not be justifiable cause; and the instruction was therefore erroneous. *La Porte v. Wallace* 89 Ill.App. 517; *Brady v. Chicago* 104 Ill.App. 131; *Sexton v. Barrie* 103 Ill.App. 386.

Instruction No. 4 completely ignores the alleged settlement which the appellant claimed to have with appellee concerning her cause of action, and which is relied on as a defense. Under these circumstances it was error to give the instruction. *Mooney v. City of Chicago* 135 Ill. 414; *Partidge v. Butler* 138 Ill. 504; *Prante v. Hartman* 133 Ill. App. 393.

Instruction No. 5 which related to the damages is also erroneous, inasmuch as it leaves it to the jury to fix a sum or any sum which they may think proper. A jury should be guided by

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the evidence in arriving at the result of the trial, the same as they should be, and that the jury is to be left to them for determination.

It is also contended, that the instruction is erroneous because of certain instructions refused. These instructions have reference to certain principles to be applied in weighing the credit to be given to the testimony of witnesses, and have reference also to the impeachment of witnesses. They are objected to on the objection however that special attention is called to the evidence of the appellee by the use of the personal pronoun; they also give undue prominence to the testimony of Frank Joslyn, Alfred Shields and Herman Whetzel. The objection will for that reason. *Tanner v. El* 101 Ill. App. 33; *Wright v. Dill* 3 Ill. App. 333; *J. & S. E. Ry Co. v. Walker* 109 Ill. 33; *Hallett v. Johnson* 73 Ill. 316; *Hatch v. Moran* 73 Ill. 379; *Brown v. Munson* 31 Ill. App. 493. Request Instruction No. 3 was properly refused, because there is no evidence upon which to base this instruction.

For the errors indicated, the judgment is reversed and the cause remanded for another trial; and inasmuch as the case is to be tried again, we refrain from discussing the questions raised concerning the weight or effect of the evidence.

Reversed and remanded.

STATE OF ILLINOIS, } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
SECOND DISTRICT. }
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

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R H J. 1-1

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191.A. 638

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6828

Edward J. Bamrick and
William G. Hanney,
Appellees,

vs.

Spring Valley Coal Company,
Appellant.

City Court
Spring Valley.

Niehaus, J.

219 I.A. 638

This suit was presented by the appellees Edward J. Bamrick and W. G. Hanney as plaintiffs, and the appellant, Spring Valley Coal Company, and Joseph F. Kimber, in the city court of Spring Valley, to recover damages for the injury to a stock of merchandise owned by the appellees, caused by smoke soot, which came into the premises of the appellees in consequence of alleged negligence of the appellant and Kimber, in making repairs on a chimney, by which the chimney had become clogged up. The declaration alleges that the defendants undertook to repair a certain chimney; and that the repairs were so carelessly made that the chimney became clogged up, and in consequence thereof, when the appellant made a fire in the heating stove on its premises, the smoke therefrom, got into the store and premises of the appellees instead of going up the chimney, and that thereby the goods and merchandise were injured. The case was dismissed as to the defendant Kimber. There was a trial by jury, which resulted in a verdict and judgment for \$1000.00 against the appellant. This appeal is presented from the judgment.

The evidence shows, that the appellees owned and occupied a two story brick building on the northeast corner of St. Paul and Spaulding Streets in the city of Spring Valley; and that adjoining the building of appellant, there was a two story brick building, owned by Mrs. Mary Devlin, which was occupied by the

Gen. No. 836

REVIEWED BY

FORM 10-11-15

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Spring Valley to 1000 ft. above sea level.

Wieder, J.

THE GIFT

J. B. Smith

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1. The following information is to be used:

1. The first step is to identify the problem.

10. 11. 1951

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THE UNIVERSITY OF CHICAGO

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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SECRET

THE UNIVERSITY OF CHICAGO

10. *Journal of the American Statistical Association*, 1991, 86, 1033-1041.

1. The first group of people who are not allowed to enter the country are those who are on the "No Fly List". This list is maintained by the Federal Bureau of Investigation (FBI) and the Department of Homeland Security. It includes individuals who are suspected of being involved in terrorism or other activities that could threaten the national security.

appellees, and used by them as a store; and in which they had a stock of merchandise for sale. There is a party wall between the two buildings, in which there are three chimneys; a chimney designated as the middle chimney, south chimney, and a north chimney. The north chimney reached down to the lower story of the two buildings, and was used jointly by the occupants of the buildings. The appellant had a heating stove in its building, which connected with the north chimney; the appellees also had a heating stove in their store which was also connected with the north chimney. In March 1910, the appellant employed Joseph F. Kimber, to put a new roof on its buildings; to remove the tin roof, which was then on, and instead put on a paroid paper roof. The evidence tends to show, that after Kimber had removed the tin roof, he discovered, that the chimneys were defective, and heeded repair work. A man by the name of Massa was thereupon employed to repair the chimneys; and the chimneys including the north chimney were repaired. There is conflict in the evidence as to who employed Massa to repair the north chimney; there is evidence tending to show, that he was employed by the appellant to do the work; also evidence which tends to show that he was employed by the agent of Mrs. Devlin, who was the owner of the building occupied by appellees. Early in the morning after the repair work had been completed, one of the employees of the appellant's building which was connected with the started a fire in the heating stove in the appellant's building which was connected with the north chimney, and about an hour later, when the appellees got to their store, it was discovered, that the smoke from this heating stove instead of going up the chimney was pouring into appellee's store, and had damaged their stock of merchandise. One of the controverted matters on the trial was the amount

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of damages which the appellee suffered on account of the smoke. To prove the amount of the damage, the appellees called T. G. Smith, as a witness. Smith had examined the stock of merchandise in the store about ten days after the injury. Objection was made to Smith's testimony on the ground that a proper foundation had not been laid for its admission; that it did not appear that at the time he made his examination and inspection of the stock it was in the same condition in which it was at the time the smoke had injured it. The court allowed the testimony to be given however on the promise of appellees, that they would furnish this evidence later. The appellees did not do so, and thereupon, later in the trial, the court on its own motion, struck out the testimony of Smith, and directed the jury to disregard it. We are of the opinion, that the testimony was properly stricken out; but error is assigned on the court's action in permitting the testimony to be given without first arguing the preliminary proof; and it is claimed that striking it from the record did not do away with its injurious effect, after the jury had heard it; and that therefore the error was not cured. Smith had placed the appellee's damages, and the depreciation in the value of the goods in stock at \$3000; and there was a wide difference between Smith's estimate of the damages to the stock and that of the only other witness outside of the appellee Bamrick. We are inclined to the opinion, that under the circumstances here presented, the error of permitting Smith's testimony to be given to the jury, was not entirely cured by afterwards excluding it; and that in this respect, it comes within the principles announced in Smith v. Kinkaid 111. App. 620; C. C. Ry. Co. v. Rublee 133 Ill. App. 333; Chicago City Ry. Co. v. Gregory 321 Ill. 591; Pierce v. Wolf Mfg. Co. 154 Ill. App. 660. We are also of opinion that the court erred in the

refusal of some of the instructions presented by the appellant. Instruction 35, which the court refused to give, but had reference to the testimony of the witness Chadwick. The appellees over appellant's objection proved, that Chadwick, who was in the employ of the appellant, as civil engineer, was on the roof of appellant's building, and was looking on, at the time the chimneys in question were being repaired; and it was also proved, that there was evidence to show that the work of repair was being done by authority of, or under the supervision of the appellant. There was no proof that Chadwick was on the roof for that purpose, or by the authority of the appellant. In this state of the evidence the appellant was entitled to have Instruction 35 given because it informed the jury, that the appellant was not in any way bound by Chadwick's presence on the roof, nor by any knowledge he might have acquired concerning the work that was done. The appellant was also entitled to have Instruction No. 36 given, which correctly stated the law concerning the burden of proof, namely, that the burden was not upon the appellant, to prove that it did not employ Massa to repair the north chimney; but that it was upon the appellees to prove that fact. We think that the appellant, was also entitled to have the jury instructed, as it requested in Instruction No. 29; namely, that if the jury believed from the evidence, that Massa was employed by the agent of Mrs. Devlin, and that the appellant did not employ him, to make the repairs in question, that then the jury should find the appellant not guilty; also instruction No. 30, which is to the effect that if the jury were unable to say, whether or not the appellant employed Massa to repair the north chimney, that they should find the appellant not guilty. We find no other

refusal of some of the witnesses to testify.
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substantial errors in the record concerning the admission or rejection of evidence. Concerning the cross errors assigned, appellees contend, that the admission in evidence of Exhibit B, was erroneous. Exhibit B is a written statement made by the witness J. F. Kimber and signed by him. It contains matters which the appellant claimed were at variance with the testimony, which the witness gave at the trial. The witness' attention was called to the statement; and he admitted, that he made the statements which were claimed to be at variance, and testified to the circumstances under which he made them; and the circumstances under which he signed the writing containing them. We are of opinion that the Exhibit was properly admitted in evidence, and that it was proper for the jury to consider the statements made by the witness in the Exhibit, in connection with his testimony given at the trial concerning the same matters. None of the other cross errors are argued, and they are therefore waived. For the errors pointed out, the judgment is reversed and the cause remanded for another trial.

R Reversed and remanded.

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STATE OF ILLINOIS, {
SECOND DISTRICT. { ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April,
in the year of our Lord one thousand nine hundred and
twenty, within and for the Second District of the State of
Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. JOHN M. NIEHAUS, Justice.

Hon. OSCAR E. HEARD, Justice.

ARTHUR E. SNOW, Clerk.

CURT S. AYERS, Sheriff.

2191.A. 638

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6255.

Oliver H. Seaton,
Defendant in error,

vs. 6

Error to County Court of
Bureau County.

George P. Seaton, individually, and
as conservator of the estate of
Oliver H. Seaton, insane.

Plaintiff in error.

219 I.A. 638

Per curiam.

Certain proceedings were had

in the county court of Bureau County, wherein Oliver H. Seaton was found to be insane and was committed to the Watertown Asylum and a conservator was appointed for his estate who qualified and entered upon his official duties. Oliver H. Seaton has sued out a writ of error from this court to review said proceedings, and he claims that the county court of Bureau County obtained no jurisdiction to make said orders for various reasons. The statute under which this proceeding was had provides for review thereof by appeal to the circuit court. Defendant in error has made a motion to dismiss this writ of error for want of jurisdiction. The same question was presented to and decided upon by this court in the Gersman v. Cooper, 125 Ill. App. 402, except that there the alleged insane person had been served with process and brought into court, while here it is contended that such service was not had. But the principle there laid down is applicable here. In the case there cited of Allerton v. Hopkins 130 Ill. 443, it was held that where in a special statutory proceeding one form of review is specifically given all other forms of review are excluded. The case before us is a special statutory proceeding, and review by an appeal to the circuit court is granted, and no other mode of review is provided. Therefore, under the authority last cited, no other form of review can be had, and the case cannot be reviewed in this court by writ of error. If some other mode of review should be provided

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that argument should be addressed to the Legislature. This writ of error is therefore dismissed.

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if error is involved in the 13th century.

STATE OF ILLINOIS, } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court,
SECOND DISTRICT. }
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 12th day of October, in the
the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

275 - 25152

ROBERT H. MOTHERWELL,

Appellee,

v.

GARFORD MOTOR TRUCK COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

219 I.A. 638

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Motherwell, brought suit in the Superior Court against the defendant for commissions upon an alleged sale of certain motor trucks, and obtained judgment in the sum of \$1635.54. This appeal is therefrom.

The declaration consists of the common counts, attached to which is a bill of particulars. The latter sets up (1) that there was due the plaintiff on May 16, 1917, the sum of \$793.91 for his services in selling ten trucks, (2) that there was due him on May 16, 1917, \$84.34 for other commissions, and (3) that there was due him on May 16, 1917, for commissions for the sale of motor trucks since September 25, 1916, being a bonus of one per cent on all trucks sold, the sum of \$1059.76. The total amount claimed, and set up in the bill of particulars is \$1938.01.

The affidavit of merits admits that there is due the plaintiff the sum of \$84.34 but denies liability for either of the other two items.

The evidence in the record consists of certain

exhibits and the testimony of seven witnesses. For the plaintiff, in addition to himself, there testified (1) Maude L. Muerschison, who was the head stenographer of the defendant during the time in question, and who oversaw the card-prospect system, the follow up system which was made by the defendant, and who took dictation from Crane, the General Manager of the defendant company; and (2) Edna Orgel, who was, also, in charge of the card-prospect and follow-up system, and who, sometimes took dictation from Golden, the Assistant Manager of the defendant company.

As to the item of \$793.91, which the plaintiff claims as commission upon the sale of ten motor trucks, the evidence on behalf of the plaintiff, made up of certain exhibits and the testimony of himself and the witnesses Muerschison and Orgel, is amply sufficient, taken by itself, to justify the judgment; and so, the substantial question is whether the evidence introduced on behalf of the defendant sufficiently overcomes that on behalf of the plaintiff to justify us in concluding that the verdict of the jury was manifestly or clearly wrong. After a careful analysis of the evidence we feel bound to answer that question in the negative. The plaintiff was a motor truck salesman and went to work for the defendant on February 1, 1916, and on September 25, 1916, his employment relations with the defendant were set forth in a letter, of that date, which was addressed to him by the defendant company. The letter and its purport are not controverted. It provided that he should receive a salary of \$50.00 a week and a commission of two per cent on all retail sales "that are sold at list price or at a

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price that nets, including the sale of second hand trucks, less than 15% off from list price", (2) that he should receive "a commission of one per cent on all trucks sold to National Users or Quantity Users who are given a discount off from list price that nets 'less' than fifteen per cent off from list price", (3) that he should receive a commission when his sales reached "a larger volume than \$100,000.00 of 1% on sales that originally were figured at a 2% commission, and 1/2 of 1% on National Users Sales that net us less than 15% off from list price", and (4) that the extra commissions were to be paid, 1/2 as soon as the gross sales reached \$100,000.00, the balance when the gross sales reached \$125,000.00, but all extra commissions to be paid within one year, and all regular commissions to be paid monthly on such trucks as have been delivered and paid for. The plaintiff worked under the contract until June 18, 1917. His work, according to his testimony, and which is not denied, was to sell such trucks as had been listed to him as a prospect, or such as he "dug up" or which were filed and on which he made reports to the office. The defendant kept a card and follow-up system of personal calls, telephone calls by the salesman, letters received and the substance of letters written by the defendant, in fact, a complete record. The master card was 5X8, and contained the name of the prospect, the district, the name of the purchasing agent of the one who was liable to buy, the name of the salesman to whom the prospect was assigned, all of the calls of the salesman, whether by telephone or otherwise, and, as testified to by the witness Muerchison, who had charge of the system, a complete abstract of what was done in each case. It was the method of the defendant that each prospect should be handled only by the one

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to whom it was assigned. That was only varied by some special arrangement between salesmen. Also, when an order was put through and a sale closed, it was the custom of the defendant to give credit to the salesman who had had charge of that prospect. From the data on the cards, there was made out from time to time typewritten memoranda of prospective purchasers and the dates upon which calls should be made, and those memoranda were placed on the desks of the salesmen to whom the particular prospects belonged. Among the cards was one of the Timroth Teaming Company. The witness Muerchison, head stenographer and in charge of the cards, says that she recalls that card, and that she heard Crane, the manager, give directions to the plaintiff in regard to the Timroth Teaming Company; that in the Fall of 1916 he would say to the plaintiff "keep after them Motherwell", "What have you heard about the Timroth deal?"; that he was continually saying that and calling him in and asking him what he had heard; that, to her knowledge, no order was ever given to take the defendant off the Timroth prospect.

The witness Orgel, who was at work there as a stenographer and had, in part, at least, charge of the card system, corroborates the former witness. She says that when there was any conflict as to a prospect the matter would be taken up and straightened out and the salesmen given appropriate memoranda to stop calling, etc.; that she never wrote nor was directed to write to the plaintiff within the time in question on the Timroth or Worth Motor Service deal; that in May or June, 1917, a few weeks before the plaintiff left, Crane took out the master card in the Timroth Teaming Co., matter and said not to let the plain-

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tiff nor any other salesman saw it unless he, Crane, took it up with him. She further stated that in the fall of 1916 the plaintiff went into Crane's office nearly every night about the Timroth or Worth deal, to talk it over; that she often in the spring of 1917, heard Crane tell the plaintiff to get in touch with the Timroth deal so that it could be closed. Crane admitted on cross-examination that he, himself, had assigned the Timroth prospect to the plaintiff. There was put in evidence by the plaintiff, thirteen lists, which had been given him between September 23, 1916, and May 24, 1917, of prospective purchasers, one of which was Timroth Teaming Co. The plaintiff testified that the Timroth prospect was not assigned between September 25, 1916, and June 15, 1917, to any other salesman. The evidence is overwhelming that the plaintiff called upon the latter company a great many times; September 26, October 11, October 17, October 24, October 30, November 17, November 21, December 5, 1916, and January 6, 1917, and endeavored to get it to purchase trucks of the defendant, also, that he solicited the company after it had changed its name. The Timroth Teaming Company was organized by W. P. Worth, who was its president, in March or April, 1914, and about March, 1917, its name was changed to the Worth Motor Service Company. The Timroth Teaming Company had bought some trucks, at least six, in March or April, 1914, from the defendant company. Timroth was Vice President and manager of the Timroth Teaming Company until he resigned in January or February, 1917. That company had an office in the Old Colony Building and a garage out on Carroll avenue. Timroth had charge of the practical affairs and officed at the garage, where the trucks were kept. On December 22 or 23, 1916, a fire occurred

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at the Timroth Teaming Company's place. When the Timroth Teaming Company was organized in March, 1914, it bought six trucks from the defendant company and they were destroyed by the fire. Between March 3, and May 19, 1917, the defendant company sold ten trucks to the Worth Motor Service Company. The above mentioned item of \$793.91 is the commission which the plaintiff claims he is entitled to on the sale of these ten trucks. Worth testified that the plaintiff did not sell them; that he, Worth, had the negotiations with Crane of the defendant company shortly after the fire in December 23, 1916; that his son, George Worth, was working for the defendant at that time and talked to him about it, but it is the evidence of George Worth that he left the defendant company about February 15, 1917, and had only worked there from October 9, 1916, and no one of the trucks was actually sold until either some time in February or March 3, 1917, and further, according to the testimony of Crane, the president of the defendant company, that prospect was assigned to the plaintiff, and he worked on it assiduously from September 26, 1916, up to and including the time when all ten were actually sold. Crane, himself, testified that the plaintiff talked with him about the Timroth Teaming Company as a prospective purchaser in the first week in January, 1917.

Analyzed carefully, it is to be observed from the testimony of Crane, that he claims that Worth, the father, bought the trucks through him, Crane, with the understanding between the elder Worth and Crane that there should be no commissions charged, or as Worth, the son was working for the defendant, any commission due him should be waived and that as between Crane and Worth, the elder, there should be no

salesman in on the deal. Crane's testimony, then, if it establishes any theory, is to the effect that, although he had assigned the prospect to the plaintiff, and admits that the plaintiff worked for a long time on it, and although he does not claim that it was regularly taken from him before any sale was made, yet, inasmuch as he, Crane, saw Worth, the elder, and the trucks were sold, as he claims, by himself, with the assistance of Worth, the son, who left, however, before the first of the ten trucks was sold, and, as it was understood that if there were any commissions they should be considered as earned by Worth, the son, and not charged, the plaintiff is not entitled to any commission. Just what particular influences and all that which finally culminated in persuading the Worth Motor Service Company to buy we do not positively and completely know, nor is it necessary. It must be considered as a practical and not a metaphysical situation. In such a commercial situation and given the evidence that was presented to the jury as shown by the record, bearing in mind that it is admitted that the prospect was given to the plaintiff, and not denied that for months he worked assiduously upon it, and that finally ten trucks were sold, we do not at all feel seriously persuaded that the verdict was wrong, let alone, clearly wrong.

There is some testimony by both the Worths as to conversations with the plaintiff concerning his commissions, which, however, is denied by the plaintiff, and as it was submitted, with all the other evidence, to the jury, we do not consider it as changing the conclusion already announced.

As to the item of \$1059.76:- The written promise by the defendant in the letter of September 25, 1916, was as



follows: "We will agree to give you a further commission when your sales reach a larger volume than \$100,000.00 of 1% on sales that originally were figured at 2% commission, and 1/2 of 1% on National Users' Sales that net us less than 15% off from list price." The contention of the defendant is that the sales of the plaintiff did not amount to \$100,000.00. It is admitted that the plaintiff did sell trucks to the amount of \$65,656.57 between September 25, 1916, and the time he left, outside of the ten trucks which were sold to the Worth Motor Service Company. The plaintiff claims that he is entitled to be considered as having sold also the ten trucks amounting to \$38,796.77, which would make a total of \$104,453.34. As we have announced that he is entitled to be credited with the sale of the ten trucks, there remain the questions (1) did the net price realize more than 85% of the list price, and (2) did the amount of the sales of the ten trucks make his total sales, subject to the promise of the defendant to pay an extra one per cent commission "reach a larger volume than \$100,000.00"?

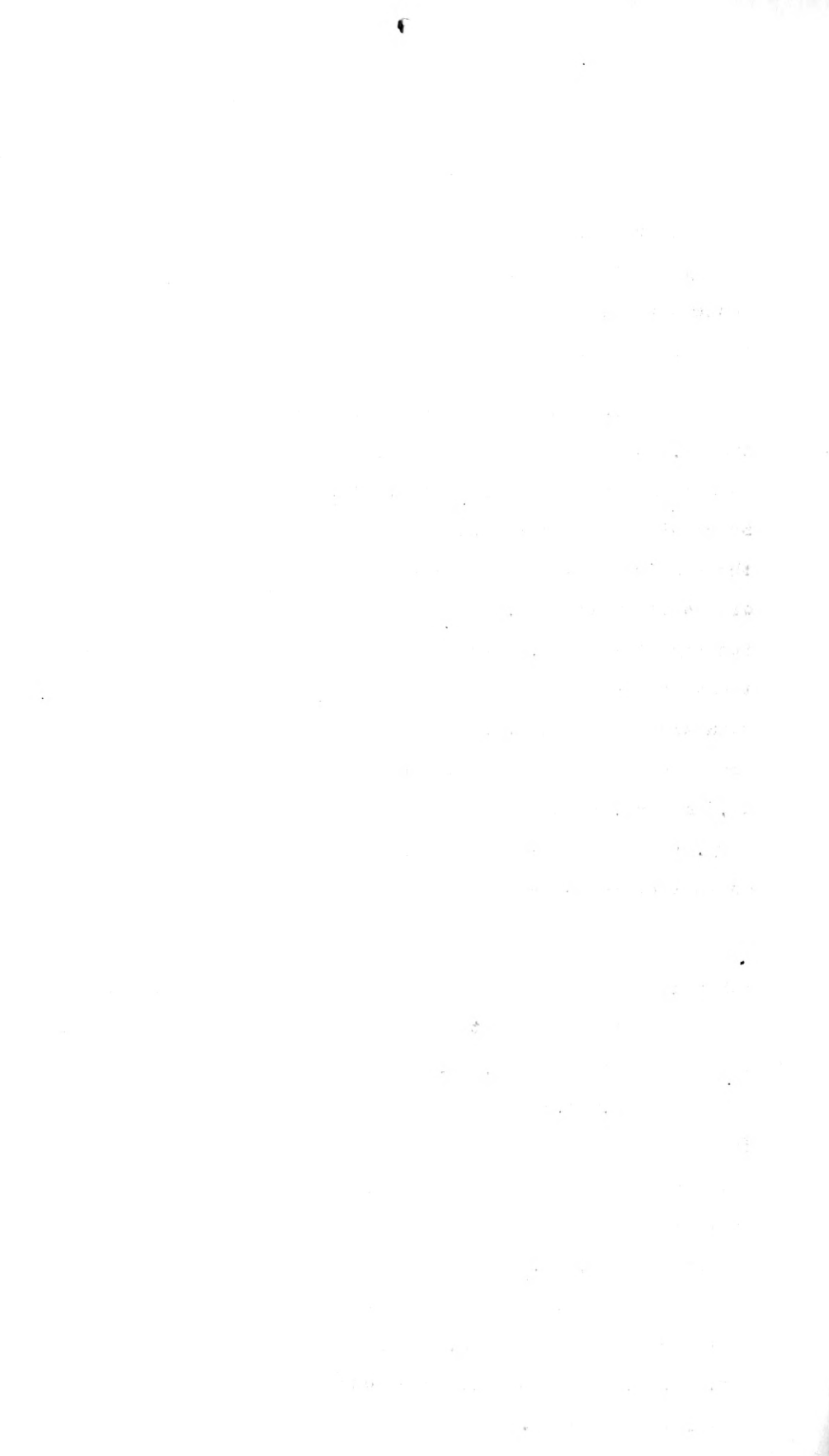
(1) The plaintiff testified that the list price of six, was \$4400.00 each, and that the sale price was \$4705.00 each; that the list price of the remaining four was \$4800.00 each and that two of them were sold for \$4805.00 each, and two for \$4905.00. According to the plaintiff, the total list price was \$45600.00 and the total sale price was \$47,650.00. Taking the list price at \$45,600.00, 85% of it is \$38,760.00, and if we then subtract the total deductions claimed by the defendant, that is \$8,654.25, from the sale price of \$47,650.00, there is left \$38,995.75, which more than equals 85% of the list price. Further, obviously, the selling price actually exceeds the list price as to each of



the ten trucks. Whether or not the plaintiff was entitled to any commission pursuant to the promise in the letter of September 25, 1916, must be determined simply by comparing the selling price and the list price.

That the defendant after selling each of the ten trucks, each at a certain price, saw fit to make various deductions for freight, hoists, etc. could not reasonably be considered in determining whether or not the sale of the ten trucks were made substantially through the efforts of the plaintiff and, therefore, whether or not he had, legally considered, earned commissions. It is even questionable whether the defendant was entitled to make any deductions from the selling price in computing the commissions earned under the written promise of the defendant; as, however, deductions were made and considered by the jury, and no cross-error is assigned there is no ground on that score for our changing the verdict.

Did the sale of the ten trucks make the total sales of the plaintiff reach the total sum of \$100,000.00? It is admitted that, outside of the sale of the ten trucks, the plaintiff sold \$65,656.57 worth of trucks. If to that is added \$38,995.75, to which latter amount the plaintiff is entitled to credit on his gross amount of sales, we have an amount in excess of \$100,000.00, showing that he was entitled to the extra commission of one per cent. The total amount is \$104,652.32, and the commission of one per cent thereon is \$1046.52. The account is, therefore, \$84.34, admitted by the pleadings, \$779.99, being two per cent on \$38,995.75, and \$1046.52, being one per cent on \$104,652.32, making in all \$1910.85. The judgment after the remittitur



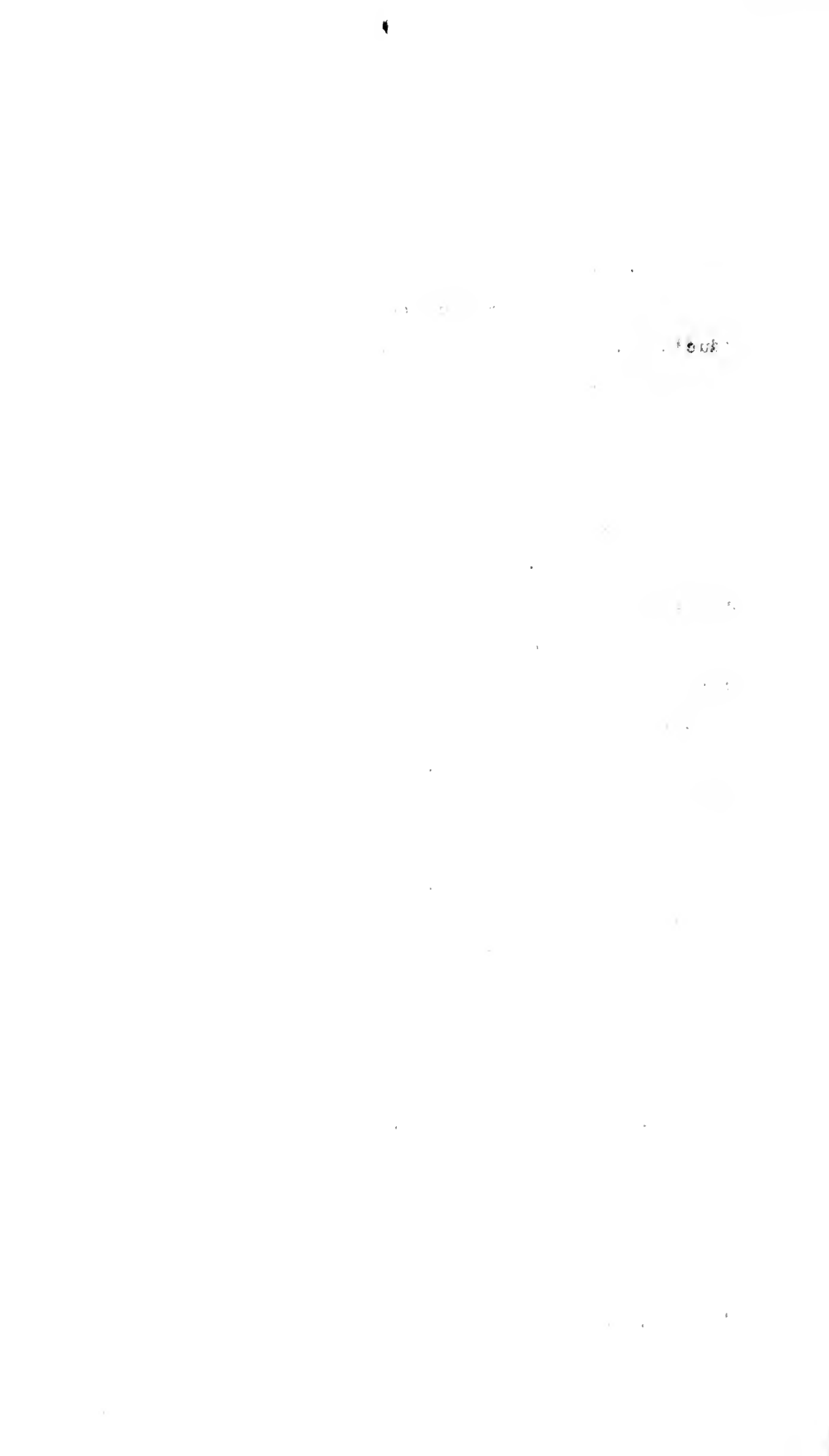
was \$1635.54. It will be seen, therefore, that it is needless to consider the contention of the defendant as to the deductions, amounting to \$3750.00, on account of the Peerless Trucks, Grams-Bernstein Trucks, Overland Coupe and Lee-Loaders, as the commission on that total amount would be less than the difference between the judgment and the sum of \$1910.85.

Complaint is made of the refusal to give two instructions for the defendant. These proffered instructions undertake to tell the jury what to do in case it believes that the North Motor Service Company "would not have bought", or "would not have purchased" any motor trucks from the defendant "except through its manager" or "from the defendant through the plaintiff", whereas the only question was, as recited in an instruction of the defendant that was given, were the sales of the trucks made through the efforts of the plaintiff or the defendant. Three instructions were given on behalf of the plaintiff, and seven for the defendant, and upon an examination of them, it appears to us, that the jury were very fairly informed of the law that was properly applicable to the evidence in the case. In our opinion a fair trial was had and there is no sufficient reason for overturning the judgment. It will, therefore, be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

(OVER)



MR. JUSTICE THOMSON ESPECIALLY CONCURRING:

I concur in the decision of this case as announced in the foregoing opinion. As to defendant's contention that under the evidence, even though it be considered that the plaintiff sold ten trucks to the Worth Motor Service Company, he was entitled to a commission on only one of them, inasmuch as defendant, as to the other nine trucks, did not receive a net amount exceeding 85% of the list price, it appears from the evidence that this was due to the fact that certain deductions and allowances were made to the Worth Motor Service Company for parts or accessories not included in the sale of the trucks. The plaintiff's right to a commission on the sale of a given truck, under his contract with the defendant, cannot be determined by comparing the list price of the complete truck, with the net amount received by the defendant for that truck, less the parts not involved in the sale at all. If the plaintiff sold the truck without the body and hoists and the net amount received by the defendant on that sale, plus the amount allowed for the body and hoists, which were not involved in the sale, aggregated an amount in excess of 85% of the list price of that truck, including body and hoists, the plaintiff would be entitled to a commission on that sale. Of course, in determining the amount of the commission to be paid the plaintiff on such a sale, the 2% would be figured only on the amount received by the defendant for the truck as actually sold, excluding body and hoists. In other words, although the deductions made for parts not sold could not be taken into consideration in determining whether the plaintiff was entitled to a commission under the terms of his contract, such deductions should be taken into



consideration in figuring the amount of his commission on those sales on which he was entitled to a commission. That this was the method actually followed by the defendant, in connection with commissions paid the plaintiff, on business done by him, is demonstrated by Exhibits 1, 2, 4, 6, 7, 9, 11, 13, and 14. In the case of all sales involved in these exhibits the net amount received by the defendant was less than 85% of the list price of the truck involved in the sale, which was by reason of the allowances made the customer for freight or for bodies, hoists or other parts not included in the sale, or for used cars turned in by the customer, and in all of those cases the plaintiff was paid his commission under his contract, the commission being 2% of the net amount realized on the sale. It appears also that in some cases a discount of \$100 was allowed for cash paid on delivery of the truck. This amount, likewise, should not be taken into consideration in determining whether or not the plaintiff is entitled to a commission.

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329 - 25208

HENRY RECHT,

Appellee,

v.

LEOPOLD OESTERREICHER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 LA 639

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Henry Recht, brought suit for damages for malicious prosecution and recovered a verdict and judgment in the sum of \$2500.00. This appeal is therefrom.

The first count of the declaration alleged that the defendant falsely and maliciously charged the plaintiff with having feloniously taken an electric motor, valued at \$200.00, a set of double harness valued at \$50.00, a saw filer valued at \$75.00, a desk valued at \$15.00, and a chair valued at \$5.00; that the defendant caused the issuance of a warrant and the arrest of the plaintiff; and that upon an examination before the court the plaintiff was adjudged not guilty and discharged.

The second count alleged that on March 1, 1915, the defendant falsely and maliciously charged the plaintiff with the offense of larceny and had him arrested, after which he was discharged; by means of which he was greatly injured, to the damage of \$5,000.00.

The defendant pleaded not guilty. The evidence shows substantially the following:- In July, 1912, Julius

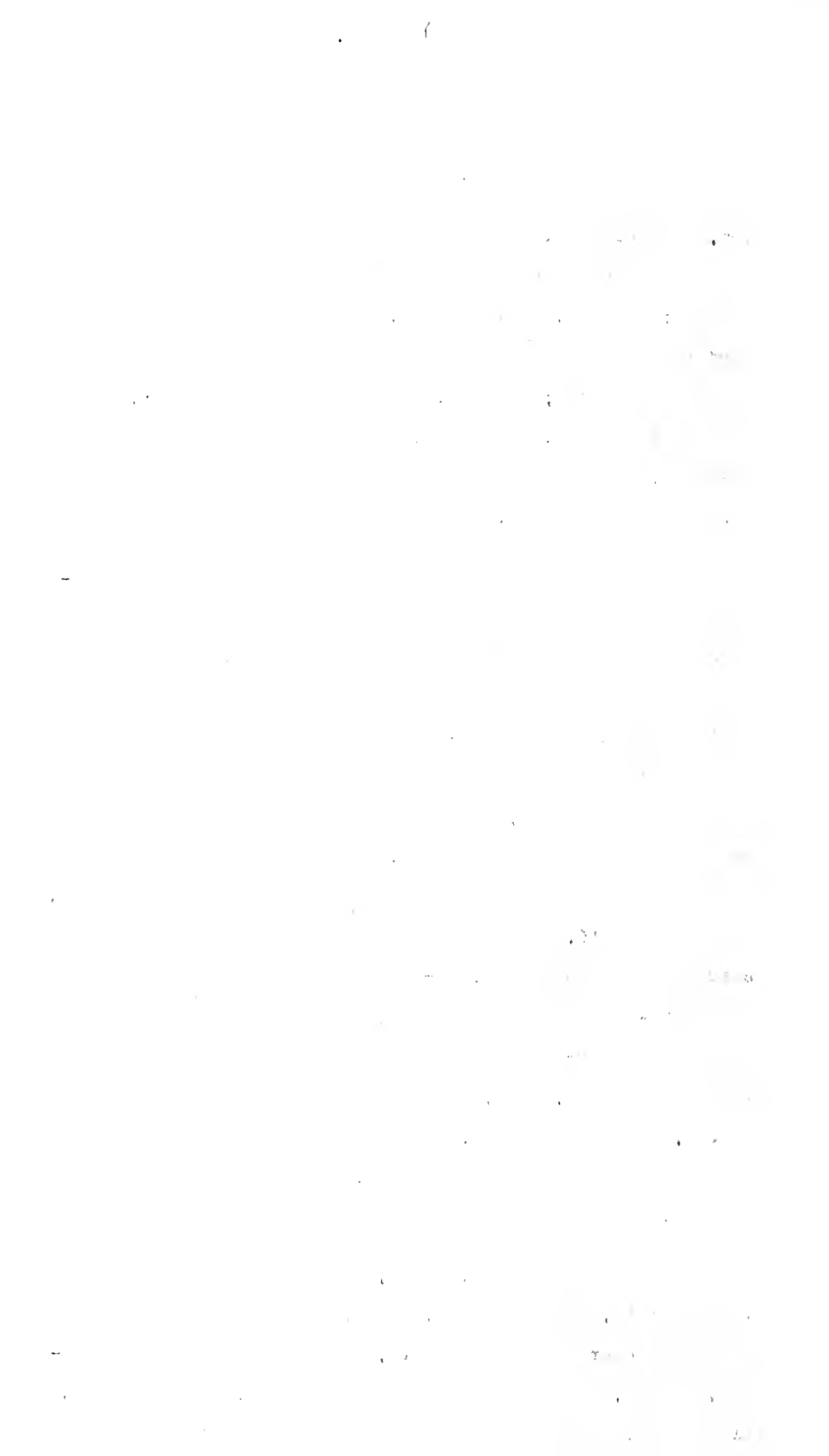
Hecht - the father of the plaintiff - and the defendant, each of whom was in the bunch kindling business, turned over their respective businesses and certain assets to the U.S. Wood and Coke Company, an Illinois corporation. Julius Hecht, in accomplishing the transfer of his business, gave a bill of sale to the corporation. In that it is recited that for \$6,000.00 he assigns to the corporation, "The Bunch wood manufacturing plant and business located at 2609 Jones street, consisting of the real estate, buildings, machinery, tools and furniture located upon said premises, together with four horses and four wagons and all harnesses and equipment located at 2340 Diversey avenue". The defendant says that the plaintiff ceased working for the corporation in March, 1914; that he discharged him, and that Julius Hecht, the father, stopped April or the first of May, 1914. He further testified that when the corporation purchased the business from the father that the horses and harnesses were kept at 2340 Diversey avenue; that he missed the harness after the plaintiff, in March, 1914, quit; that he was told by one Bollin that he, Bollin, saw the harness "on Hecht's horses"; that one Egger said the same thing; that that was in 1915, about two weeks before he swore out the warrant; that the harness which was brought into court was taken from the plaintiff's horses and belonged to the corporation.

As to the saw filer, motor, desk and chair, plaintiff's father, Julius Hecht, testified that in the winter of 1913-1914, in the presence of his son, the plaintiff, he told the defendant that the boys in the neighborhood of his former factory (2609 Jones street) which he had turned over to the corporation, were stealing the machinery, such as knobs, hand-

les, and selling it as junk; that the defendant asked if it could be removed to Julius Hecht's basement or barn for safe keeping; that he, Julius Hecht, then asked the plaintiff if "we" had room for it and he said "If we have'nt room we will make room for it"; that he, Julius Hecht, the father, then had the saw filer, the motor, desk and chair removed to the basement; that he afterwards told the defendant and the latter said it was all right.

The testimony of the plaintiff as to that conversation and the removal of the property mentioned is in entire accord with his father's. As to the harness:- and it is not claimed there was probable cause to believe the plaintiff had stolen anything but that - the father testified that, at the time he went into the corporation, he had some harness which did not belong to it; that he bought it in 1911; that he did not sell it to the corporation. The plaintiff testified that the harness in question was bought by the Hecht's years ago, in 1909 or 1910, that it was a family affair; that it was not sold to the corporation. One Kubetz, a harness manufacturer of thirty-five years experience, testified that he had made hundreds of harnesses of the type of the one in question; that in December, 1910, he sold a set to Julius Hecht for \$35.00; that he paid \$10.00 when he got it, and would pay ten or fifteen dollars every year; that he paid the balance in 1915.

Four witnesses, Egger, who worked for the corporation in 1913, 1914 and 1915, Simon, who worked there as cashier and bookkeeper in 1913 and 1914, and a nephew of the defendant, Bollin, who worked there as a teamster, and one Reitz, all testified that the harness in question belonged to the



corporation. Egger says he saw Max Hecht and the plaintiff with the harness on their horses and asked them if they were not afraid to put it on. Simon says the harness is the same as the one he saw on a team of the corporation; that he saw the harness every day; that he missed it about the time the plaintiff left and did not see it again till in the court room; that he knows it is the identical harness. Hollin, the teamster, says he saw the plaintiff drive with it on his own team two or three weeks after he left the corporation; that he reported it to the defendant; that he told the defendant that they missed the harness; that he is positive that the harness in question is the one the plaintiff had in his possession. Dicus, a lawyer and attorney for the defendant, testified that the defendant consulted with him and he advised bringing in the witnesses; that he brought in Egger, Reitz and Schmidt and he talked with them; that he then advised him to take out a second warrant; and that under the circumstances he would be justified in taking out a warrant. A complaint, for a search warrant for a set of double harness concealed at 2340 Diverssey avenue, with the endorsement of Prindeville, Judge, that he had examined it and was satisfied that a search warrant should issue, was offered and admitted in evidence. Also the search warrant itself, showing its execution as to one double set of harness, valued at \$50.00. The plaintiff offered in evidence the complaint made by the defendant which charged the plaintiff with stealing a set of double harness valued at \$50.00, and also, the warrant for the arrest of the plaintiff. At the close of the evidence six instructions were given on behalf of the plaintiff; six on behalf of the defendant; and six others offered by the defendant were refused. The jury found the issues for

the plaintiff and assessed his damages at \$2500.00. Judgment was entered thereon, and this appeal then taken.

The quantity and quality of proof legally necessary to establish the defense of probable cause in a suit for malicious prosecution is generally far less than, and different from that required to prove guilt in a criminal prosecution for the crime charged. Anderson v. Friend, 85 Ill. 135.

In the instant case, the evidence, introduced by the defendant, on the subject of probable cause seems to be overwhelming and to outweigh all reasonable inferences to be made from the testimony and evidence on behalf of the plaintiff. Egger, Simon, Bollin and Reitz, certainly must be given some credit, especially as the plaintiff and his father corroborated slightly by Kubetz, are all who testified for the plaintiff; for, even if the plaintiff and his father were telling the truth, and the father had bought the harness in 1910 or 1911, non constat that the defendant, under all the circumstances shown, was not justified in believing that there was probable cause for obtaining the plaintiff's arrest.

If the jury believed the plaintiff and his father, that the harness in question was bought by them or one of them in 1909, 1910 or 1911, and never was sold to or belonged to the corporation, still, in view of the testimony of Egger, Simon, Bollin, Reitz and the defendant, it is difficult, in deed, to resist the conclusion that probable cause was shown by an obvious preponderance of the evidence on that subject.

As to acting upon the advice of counsel; it is true, if the jury believed that the harness never belonged to the corporation, and further, that the defendant knew it did not,

but failed to disclose the whole material truth to his counsel, then that defense failed. But we do not base our decision on that ground. We are of the opinion that the evidence overwhelmingly shows probable cause; and that the verdict of the jury was manifestly against the weight of the evidence.

The judgment, therefore, will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that the defendant Leopold Osterreicher, did not cause the arrest of the plaintiff, Henry Hecht without probable cause.

O'CONNOR J, DISSENTS.

THOMSON, J. ESPECIALLY CONCURRING:

The defendant in this case is shown by the evidence to have acted on the advice of counsel after what appears to have been a disclosure to him of the entire situation and after his counsel had conferred with several of the ones who had informed the defendant of the facts upon which he asked his counsel's advice. It seems to me that the decision of this case must turn on the question of probable cause. In my opinion, the plaintiff failed to show that the defendant acted without probable cause. It may be said that he made out a prima facie case on that question by his case in chief, when he and his father testified that the harness (which is the real article in controversy) had never been the property of the corporation but had been purchased

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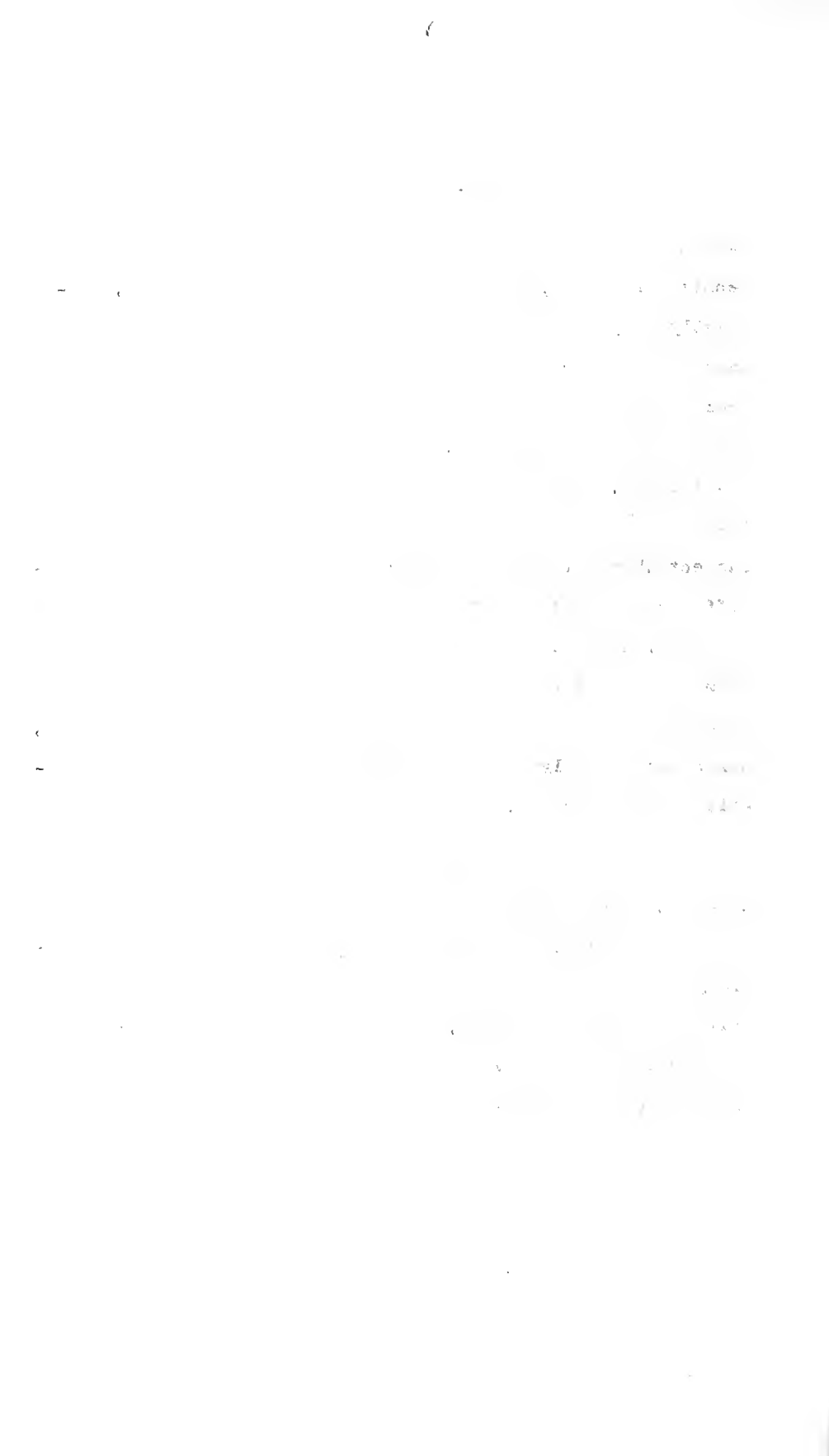
243

by the father and had always remained his property. But that prima facie case was wholly met and overcome by the testimony introduced by the defendant to the effect that the bill of sale, from the Hechts to the corporation, included "all harnesses and equipment located at 2340 Diversey avenue," which was the barn which had been used by the Hechts in the conduct of their business up to that time; that this particular harness came to the corporation under that bill of sale and was used by the corporation continuously thereafter in the conduct of its business until about the time the Hechts discontinued their connection with the corporation, when it disappeared; that later certain employees of the corporation saw the harness being used by the plaintiff on a team he was using in connection with the business he had resumed when he severed his relations with the corporation and that they told the defendant about it, one of them saying he had seen the plaintiff and his brother using this harness on their team and had asked them if they were not afraid to put that harness on the horses, and that they said, "No, we have to put it on."

Beyond the bare denial of that conversation by the plaintiff, his case in rebuttal failed to meet this issue entirely. He did not show, nor attempt to show, that his harness was not "located at 2340 Diversey avenue", at the time of the bill of sale, and therefore not included in it. In the absence of some evidence to the contrary, there is strong inference in the record that it was there, for that was the barn which was then being used by the plaintiff and his father and brother in connection with their business at which they kept their horses, vehicles and other similar equipment. After this bill of sale was executed and the business of the

Hechts was consolidated with that of the defendant, and the Hechts were employed in connection with that business, presumably they entirely discontinued their business and would have no occasion for the use of such a team harness as this. There is no evidence showing they did use this harness or had any use for it themselves, after the corporation was formed. And further, there is no testimony whatever showing or tending to show that the defendant had any reason to believe or suspect that this harness was in the possession of the plaintiff and his brother after they left the business of the corporation, under any claim of ownership on their part, aside from the mere fact (to which there is some reference in the record) that the Hechts still owned stock in the corporation, which would hardly seem to involve any question of the ownership of this harness.

It therefore seems to me that the defendant's case tended strongly to show that he did have probable cause and that it overcame plaintiff's prima facie case to the contrary and further that plaintiff's case in rebuttal wholly failed to meet that issue, from which I have been compelled to conclude that the verdict and judgment for the plaintiff are against the manifest weight of the evidence.



87 - 25338

PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,)

v.)

LORENZO ROMANDANO,)

Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

219 I.A. 639

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On May 19, 1919, one Bernacchi filed an information in the Municipal Court alleging, inter alia, that Lorenzo Romandano, the plaintiff in error, on May 15, 1919, was an idle and dissolute person, habitually neglectful of his employment and calling, did not lawfully provide for himself, neglected all lawful business, habitually mispent his time without giving a good account of himself, is known to have no legal means of support, and is habitually found prowling in, and loitering around stores in violation of Section 270, Chapter 38, of the Revised Statutes of the State, and against the peace, etc.

The plaintiff in error, hereinafter called the defendant, filed his recognizance, a plea of not guilty, and a jury waiver. A trial was had, at which the evidence consisted of the testimony of four witnesses; three policemen testified on behalf of the people; and the defendant, on behalf of himself.

Bernacchi, a policeman, testified that he had known the defendant for more than four years; that he had seen him

continually on the street for the past eight months, sometimes two or three times a week; that he had never known him to work for any length of time; that he was constantly walking the streets with one Belcrasto, without doing anything; that every time he asked him why he did not go to work he always said he was working; that he always saw him in a saloon playing cards or pool, or on the street about any time between eleven A.M. and five or six P.M.; that the defendant never told him where he worked.

The witness Devito, a policeman, testified that he knew the defendant about five years; that he has no business; that he, the witness, is of that opinion because he met him on an average of fifteen or twenty times a month; that he told him he would lock him up if he did not go to work; that he asked him why he did not go to work and support his family, but got no answer; that once he said he did work for the Sawyer Biscuit Company; that Sergeant Carter arrested him about a year ago for a "stick up", and he was held to the grand jury, but the complaining witness could not be found and so a "no-bill" was voted.

Paul Riccio, a policeman, testified that he knew the defendant about five years and had seen him about three or four times a week and on each occasion interrogated him; that he said he worked in a saloon on Harrison street, but that that was looked up and found not to be true; that a year and a half ago he was arrested, and had a gun, and was fined \$20.00 and costs; that during the four years he (the witness) has known the defendant, the latter has had no occupation; that he wears good clothes.

The defendant testified that he is at present employed as assistant warden by the Forest Preserve Commissioners of Cook County and has been since May 24, 1919; that his work, as far as he knows, is to continue during the summer. The defendant produced a letter purporting to be signed by one "John F. McCaffrey, District Forester", dated June 2, 1919, which is as follows: "The bearer, Lorenzo Romandano, has been employed by the Cook Co. Forest Preserve since May 24, 1919, and will be kept at work all summer. During this time he has performed his duties in a capable and industrious manner." The defendant testified that before he went to work for the Forest Preserve District he worked for several years as a porter and general utility man in the saloon of Rosa Alberti at 839 West Harrison street, Chicago.

At the close of the evidence, the trial judge found against the defendant, entered judgment accordingly, and sentenced him to the House of Correction for ninety days. The defendant prosecuted a writ of error. It was made a supersedeas and a bond of \$5,000.00 was given.

The defendant claims that the evidence does not support the conviction. The policemen, all three, stated that they had known him over four years and had seen him often; Bernacchi says, two or three times a week for the last eight months; Devito says, fifteen or twenty times a month, and Riccio says, three or four times a week; and as to his working and his habits, the testimony of all three is that he habitually mispent his time, was idle and conducted himself in violation of the statute. The evidence to the contrary is merely the statement by the defendant



that since the information was filed, he has been working for the Forest Preserve Commissioners, and that before he went to work for them, he worked several years as a porter and general utility man in the saloon of Rosa Alberti. His evidence is not persuasive. It does not seem strong enough to make the testimony of the three policemen doubtful. Of course, the trial judge had them all, policemen and defendant, before him, and was in a much better position to pass upon their credibility than we are. Considering what the record shows, we do not feel justified in overturning the judgment that was entered. People v. O'Keefe, 178 Ill. App. 36. People v. Ahn, Gen. No. 24392.

The defendant claims further, that he was arrested without warrant. The record shows that on May 19, 1919, leave was given to file an information; that, on the same date, it was filed; that the defendant entered into a recognizance for his appearance, and then, after certain continuances, went to trial. In that state of the record no question can arise as to the issuance of a warrant.

Finding no error in the record, the judgment is affirmed.

APPEAL DENIED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

130 - 24999

*Carters are
denied*

J. D. HOLLINGSHEAD COMPANY,
a corporation,

Appellee.

v.

U. S. INDUSTRIAL ALCOHOL COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPREME COURT,

COOK CO. CTY.

2191A. 639

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of defendant's refusal to receive a quantity of barrels to be manufactured and delivered by plaintiff to defendant. At the close of the plaintiff's case there was an instructed verdict in favor of plaintiff for the amount of its claim, \$41,620.69, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff with offices in Chicago operated a plant for the manufacture of barrels at Keokuk, Ia.; that defendant was engaged in the manufacture of denatured alcohol at Peoria, Illinois, and needed barrels for its product; that on February 20, 1907, plaintiff wrote defendant a letter offering to manufacture and sell barrels to defendant. The terms of this letter were accepted and constitute the contract between the parties. It is as follows:

"Peoria, Ill. February 20th, 1907.

U.S. Industrial Alcohol Co.,

Peoria, Ill.

Gentlemen:-

Confirming our Mr. H. T. Hollingshead conversation with you today, we hereby agree to furnish 400 barrels per day during the months of March, April and May, 1907, to be made from strictly first-class white oak oil staves and heads, to contain eight regular barrel hoops, and to be of a capacity of 50 to 52 gallons; also at the rate of 100 eight hoop half-barrels made from like stock, capacity 30 to 32 gallons. To be delivered f.o.b. care your distillery, Peoria, Illinois, at \$1.80 for the barrels and \$1.50 for the half-barrels.

From June 1st, 1907, to the first of January, 1908, we agree to deliver the same number of barrels and half-barrels per day, made from exactly the same quality of stock, at \$1.75 for the barrels and \$1.45 for the half-barrels, of like capacity, f.o.b. care your distillery Peoria, Illinois.

All packages delivered during the months of March, April and May, as well as all other packages delivered up to the first of January, 1908, are to be subject to the inspection of Mr. J. E. Murphy as to quality. Terms of payment to be cash upon receipt of the packages.

The above proposition is subject to unavoidable accidents, to either party to this agreement.

Yours very truly,

J. D. HOLLINGSHEAD & Co.,

By H. T. HOLLINGSHEAD,

Vice-Pres."

The contract by its terms expired January 1, 1908. Shipments of barrels were made from time to time aggregating 11998. No half-barrels were shipped. Two or three carloads were shipped during January and February, 1908, but none were shipped after February, 1908. About June 4, 1908 defendant's plant at Peoria closes down. Afterwards, on April 18, 1909, plaintiff brought this suit to recover damages claiming that defendant had refused to accept the balance of the barrels called for by the contract, viz: 92008, and all of the half-barrels, 26000. It offered evidence tending to show what its loss was on each barrel and half-barrel, and the verdict was for the amount it claimed.

Plaintiff's position is that the contract called for a gressse number of barrels - 104000, and 26000 half-barrels, and that the reason that all of these barrels were not shipped to defendant prior to January 1, 1908, was that defendant from time to time requested that shipments be deferred for the reason that its denatured alcohol business had not developed as defendant had expected, and that plaintiff acceded to this request; that in these circumstances the law is that the time within which the barrels were to be delivered was enlarged to a reasonable time beyond January 1, 1908. On the other hand, defendant takes the position "that this was a contract to be performed each day and that if, by mutual consent days were allowed to pass without deliveries, no claim could be made that the daily quantities accumulated, but the default was waived"; that afterwards both parties by their course of conduct treated the contract as requiring plaintiff to furnish defendant all the barrels and half-barrels defendant required in the conduct of its business, and only as ordered by defendant, and further that the time of delivery was not extended beyond January 1, 1908.

The contract, by its terms, required plaintiff to ship barrels to defendant beginning March 1, and we find that the following shipments were made by plaintiff although the record does not show that defendant gave any specific orders: March 1, none, March 2, 266, March 7, 267, March 9, 201, March 15, 624. No barrels were shipped on the days intervening the shipments as set out. On March 18 defendant wired plaintiff to discontinue shipments until further notice stating, "We are pretty well stocked up with barrels for the present and it will be a great help to us if you will refrain from making

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any more shipments until further notice, which will probably be early next week." On March 20 plaintiff acknowledged receipt of this letter and on April 8 wrote defendant:

"We would be pleased to know when you want further shipments of barrels, and wish to advise you that all barrels from now on will be invoiced at the price of \$1.75 instead of \$1.80, as the writer promised Mr. Kinsinger and Mr. Murphy that if the situation eased off any he would do this. They in turn agreed to be as lenient as possible about requiring barrels for prompt shipment. We, however, anticipated that they would use some, and we really figured on two or three cars a week being used by you.

If it is satisfactory, we would like to ship about this many every week until you desire more shipments."

On April 11 defendant replied that it was pleased at the reduction in price made and continued,

"We had hoped that before this you would have resumed regular shipments of barrels but circumstances are such that we must ask that you hold off for a while longer at least.

We are endeavoring to work off the surplus that we had on hand and find this to be slow work owing to the Distillery running at such a small capacity. However, we are of the opinion that within a very short time we will increase the capacity of the plant, consequently use more barrels, and, of course, we will expect you to furnish them.

At this time we do not think it advisable to commence shipping until you hear from us again."

On May 3d, the defendants wrote:

"We are now in a position to take a few carloads of empty barrels and would ask that you resume shipping as follows:

- 1 car Monday
- 1 " Wednesday
- 1 " Saturday

of next week and having done this, do not ship any more until you hear from us. We would also ask that you instruct your factory to be more particular about the head hoops as on most of the barrels received it has been almost impossible to drive them without damaging the barrel."



To this plaintiff replied May 4,

"We have the honor of your favor of the 3rd, and will forward the three cars of barrels as indicated."

May 16 plaintiff wrote,

"In reference to half-barrels which we agreed to deliver you 100 per day:

Any time that you are ready for shipment of these half-barrels, we shall be pleased to forward them. We can make up a car or two for you right away, if you wish.

Would also like to know what you want in the way of big barrels. We have prepared ourselves so as to take care of your business, and would like to have orders at the rate of about 400 per day, from now on."

To this defendant replied May 21,

"Would say that we are not at this time ready to receive half-barrels as we have quite a stock on hand. We are also well filled up with barrels as we are running on a small capacity.

We think it is best at this time not to begin shipping us regularly, but will advise you later when to resume, and in this way we can keep our storehouse from becoming congested.

You will hear from us in the near future in regard to shipments."

June 8 plaintiff wrote,

"We thank you for this remittance and we would be pleased to have you advise us when we may make further shipments."

On June 19 plaintiff again wrote Nelson Mayer who seemed to be an officer of defendant company as follows:

"We would be pleased to have you express your views as to what the prospects are in the way of using barrels at Peoria.

We have purchased and accumulated a large quantity of this stock, contemplating making these barrels. For that reason, we are quite a little disappointed not to have them ordered



out pretty freely.

If consistent, the writer would like to have an expression from you along these lines."

To this Mayer replied on June 21 that as soon as he secured the necessary data he would write what the prospects were, and on July 1 Mayer again wrote,

"It seems that the denatured alcohol business has not developed as rapidly as it should, and in consequence, they have been unable to use as many barrels from you as was hoped for. In order to be very fair with you in this matter, we intend to use all the barrels your contract called for, but may be compelled to ask for the time delivery to be extended. I mean by this that our contract would not expire on January 1st, 1908, but would be continued into 1908.

Do you make any spirit barrels? If so, it might be possible that we could arrange to dispose of some of these for you, to equalize in a measure our failure to take as many off the oil stock barrels as expected."

To this letter plaintiff replied July 3,

"We will try and do the right thing by you when the times comes for you to order some more barrels. We are having about all the business we can handle right now on making red oak barrels, so that it is immaterial to us just now whether you take the barrels or not. The situation may change, however, in a short time."

On July 3 defendant wrote,

"Kindly ship us at your earliest convenience one (1) carload of barrels."

On July 6 plaintiff replied to this letter,

"We will mail order for shipment of another car of barrels to you to our Keokuk plant today, and we will get same shipped just as soon as we possibly can.

"We are pretty well loaded up with orders now on the packing house trade and it may be a few days before we can get it off."

Defendant replied to this on July 8,

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"We are in no particular hurry for the shipment of barrels and if it is an accommodation to you we are willing to wait a reasonable time.

We have been slow in sending you our orders and for this reason we thought we would be able to use a carload or so shortly as our stock of old barrels which has been our main source of supply is becoming somewhat small."

On July 10 plaintiff wrote,

"We will forward you all the packages promptly that you may want, and wish to thank you for this order."

July 17 defendant wrote,

"Please enter our order for prompt shipment one (1) carload of barrels, same as last. You may also enter our order for one (1) carload of the same cooerage, shipment to be made on the 22nd inst."

Plaintiff replied to this letter two days later,

"We have forwarded your order for the two cars of empty barrels to the factory, one car to be shipped promptly and one car July 22nd, and trust you will find same entirely satisfactory."

July 22nd defendant wrote,

"Kindly ship us at once two (2) carloads of barrels."

As we have heard nothing regarding the two cars ordered the 17th we would kindly ask to have same traced so as to insure prompt delivery."

To this plaintiff replied on the 23rd,

"We have today forwarded instructions to the factory to ship you two more carloads of barrels as promptly as possible. * * * One car went forward to you today."

August 22nd defendant wrote,

"Please ship at once, as we are in a big hurry, two (2) carloads of barrels. If you cannot ship both at once, ship one car sure."

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The next day plaintiff replied that they had ordered two cars shipped and, "will try to get same out promptly." On August 24, defendant wrote confirming the order of the 22nd and said,

"We are urgently in need of these barrels and would kindly ask you to do all in your power to hurry the same forward.

You may enter our order for prompt shipment - two (2) additional cars - to be shipped Monday, if possible.

Also two cars to be shipped Thursday."

On August 26 plaintiff wrote acknowledging receipt of telegram and letter of the 24th and continuing,

"We wish to state that we would appreciate it if you would place your orders four or five days in advance for your requirements, as it gives a better chance to get them out.

We have entered your order for an additional four cars for shipment this week.

Kindly advise us what you want next week so that we may be able to forward them when you want them."

On the next day defendant replied,

"We agree with you that we should have given you more notice, but the fact that the ordering of barrels was neglected is the reason for our urgent request to ship at once.

We thank you for the courtesy in the matter and shall endeavor to give you more time in the future.

You may enter our order for shipment for 2 carloads of barrels to come forward at your earliest convenience."

To this letter plaintiff replied the next day,

"We have entered the order for two more cars of barrels, and will try to keep them coming along in order to take care of your requirements."

September 4 defendant gave another order for two cars to be shipped at plaintiff's earliest convenience.

September 6 plaintiff wrote,



"We acknowledge receipt of your order and same will be shipped promptly."

September 20 defendant wrote,

"We wired you today as follows:

'Ship at once two carloads barrels," which we now confirm.

If you are unable to load these two cars out for us tomorrow, kindly see that same comes forward on Monday, and in addition to these two cars, load 2 cars a day or so after making four cars for the week."

On the next day this was acknowledged, plaintiff stating that the barrels would undoubtedly be shipped "today or Monday".

On October 7 defendant ordered two carloads. This order was acknowledged the day following by plaintiff who said,

"We have forwarded your order for two carloads to Keokuk, for prompt attention."

On October 16 plaintiff wrote acknowledging receipt of defendant's telegram for four cars, and stated that the cars were being ordered forward promptly. On the next day plaintiff wrote defendant acknowledging an order and said,

"We have entered the order for the four cars of barrels and also for three cars per week, for which we thank you."

On November 5 defendant wrote,

"Please discontinue shipments of barrels to us until further advised."

On the next day plaintiff replied,

"As you suggest, we will notify Keokuk by mail today not to make any further shipments to you. In the meantime they may have a car or two on the way, for which you have not received bills, but we will head it off as soon as possible. * * * Just as soon as you want more barrels to come forward, please let us know and we will serve you to the best of our ability."

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On November 7 defendant wrote acknowledging receipt of plaintiff's letter and said,

"Would kindly ask that you continue shipments at the rate of one carload per week until further advised, owing to a strike at this plant, as well as at others, we have become overstocked, and inasmuch as we are running at reduced capacity, we have sufficient barrels to last until some time to come."

On the next day plaintiff wrote that they had instructed the plant to continue shipping at the rate of one carload per week until further orders.

November 25 plaintiff wrote,

"We have been carrying quite a stock of half-barrel material at our plant for you, and if you are using any of these half-barrels we would like to put in a car or two."

On November 27 defendant acknowledged receipt of this letter and said,

"Regret to advise you that we still have a sufficient quantity of half-barrels on hand and, therefore, are unable to grant your request to allow you to make shipment of a car or two.

As soon as possible we will advise you further in this direction.

You will kindly discontinue shipments of barrels as our warehouse is full and orders are coming in very slowly."

This letter was replied to by plaintiff November 29.

"We sincerely trust you will favor us with an order for some half barrels just as soon as you possibly can, as we have been carrying quite a lot of this stock (enough to make five thousand half barrels) there in Keokuk ever since the order was given.

Also give us instructions for shipment of barrels, all you possibly can, during the next month as after this month we expect to be loaded down with business for the packing house trade, and we hope you will kindly favor us in taking in every barrel you possibly can during December, as we have tried to be just as lenient and nice as we knew how

to be, in handling this business to your best interests."

The next day defendant replied stating that it desired

"to acknowledge appreciation of your leniency in the past and also to advise that just as soon as we get a little room in the barrel warehouse, we shall be pleased to order forward as many barrels as possible. We still have many half-barrels on hand for the reason that we are making few or no shipments of this size package * * * However, we hope to advise you shortly to ship us some more barrels."

December 2 plaintiff wrote acknowledging receipt of defendant's letter and said,

"Now a recapitulation of this deal we think is in order, as it is getting near the end of the time when the contract should be completed.

The contract calls for 400 bbls. per day for ten months, or practically 100,000 bbls; 100 half bbls. per day for ten months, which would be practically 25,000 bbls; total - 125,000 bbls., against which we have shipped you, up to the present time, 11,410 bbls., including the car for which we are mailing you invoice today.

This leaves a balance of 113,590 bbls. and half bbls. yet to come to fill the deal, on which we are willing to extend time sufficient to use up these barrels at a reasonable quantity per day. In fact, we feel disposed to do everything that is in our power to make it as easy as possible for you, and supply you with barrels as near as possible when you want them, but on the half barrels we think we had better change this contract to barrels, (as you seem to be using no half barrels at all) taking as many barrels as you should have taken half barrels, and we will proceed to work up our half barrel stock, that we have on hand, into pork barrels. Of course, this will mean considerable of a loss to us as we have bought three-quarter inch staves and been prepared to take care of your contract for half-barrels.

We notice your wishes for us to discontinue shipments, and we will do so for the present, hoping that you can take within the next week at least two or three cars."

On December 10 plaintiff wrote and after making request for payment of barrels delivered, continued,

"We hope you will pardon us for being so persistent in trying to make our collections from you, but the Keokuk plant is carrying subject to your call at any time, stock enough to make about fifteen thousand dollars worth of cooperage for you, and it makes quite a load for them to take care of, and while you are using the cooperage so lightly it makes a heavy load for that end of the business."

On the next day defendant resitted a check but nothing was said in reply to the letter of December 2. December 17 plaintiff wrote,

"If agreeable, we would like to put in a carload of barrels a week, starting in next week."

This letter was replied to on the 19th in which defendant stated,

"We hope to be able to comply with your request. Could do so at once but business is at a standstill and only for this reason we are deferring shipment of barrels."

On January 16 and again on January 22 defendant wrote a letter requesting plaintiff to cancel an order given for barrels. On January 22 plaintiff, by letter, stated it would comply with defendant's request. On March 26 plaintiff wrote,

"We would like to make shipment of a few cars of barrels to you, if convenient."

On the next day defendant replied that its warehouse was still full of barrels due to lack of business in the denatured alcohol line and that it was impossible to comply with plaintiff's request. On April 11 plaintiff wrote that it had 3000 barrels ready and would like very much to ship them at least at the rate of one car a week. Two days later plaintiff replied that it could give no further orders on account of lack of business. On April 14 plaintiff wrote,



"We have a few of these barrels in our way, and if you can possibly let us ship over a carload, so we can get them out of the front of our warehouse, it would be greatly appreciated.

On the next day plaintiff wrote,

"We will endeavor the first part of next week to send you an order for a carload of barrels."

On the 30th of April plaintiff wrote that their plant was so crowded with the barrels that they wanted to ship some to defendant. On the next day defendant replied that they were still unable to take the barrels "for the reason that business is very dull and we are getting in more old barrels than we can use." On May 13 plaintiff wrote defendant that it had two cars of barrels which it would like to ship. The next day defendant advised that they were unable to use the barrels as they were shutting down their plant. On June 4 plaintiff wrote that it was carrying "ever since we took your contract, some \$15,000 worth of material for your barrels. We feel that we should be given some consideration for same, as, if we had anticipated your not using at least a portion of this coöperage, we would have looked for business elsewhere, and, as we have written you several times, we have a couple of cars of these barrels made up. Would like to have your ideas in the matter." On the next day defendant replied "that the distillery is closed down and it is impossible for us to receive coöperage from anybody."

We have set out in great detail the correspondence between the parties. At no time were the barrels shipped in the quantities which plaintiff contends the contract required. It will be seen that from March 1 to March 15 there were but 1358 barrels shipped and no half barrels. Why the plaintiff



did not ship 400 barrels and 100 half-barrels does not appear. No barrels were shipped after March 15 until May 6, and no half-barrels at any time. But 11,410 barrels were shipped prior to January 1, 1908, the date when the contract was by its terms to expire. After that date during the months of January and February, 598 were shipped. It is true that on March 18 defendant requested plaintiff to discontinue shipments until further notice because, as it stated, they were stocked up with barrels. Plaintiff agreed to do this and in its letter of April 3 requested defendant in turn to be as lenient as possible about requiring barrels for prompt shipment. But plaintiff contends that the time provided in the contract for the delivery of all the barrels by January 1, 1908, was extended, for defendant in its letter of July 1, 1907, which stated that it would take all the barrels the contract called for although it might be compelled to ask that the time for delivery be extended beyond January 1, 1908. But plaintiff did not accept this proposition and on December 3 it stated that the time for delivering all the barrels under the contract was nearing the end. This would tend to indicate that at that time plaintiff did not consider the time had been extended. We think upon a careful consideration of the correspondence between the parties and the number of barrels delivered and received that the construction put upon the contract by the parties themselves was that plaintiff was to furnish such barrels as defendant would need in its business, not to exceed, however, 400 barrels and 100 half barrels per day. This is further borne out by the fact that defendant's business was a new enterprise and did not develop as the parties had hoped it would. Plaintiff drew the contract in

question and, under the law, if there is any ambiguity or uncertainty, it should be construed most strongly against it.

Massey v. Belfort, 68 Ill. 292. Nor do we think that the time for delivering the barrels was extended beyond January 1, 1902, by the fact that defendant gave orders for barrels which orders were filled after that date. Globe Brg. Co. v. Malting Co., 247 Ill. 622. In that case the Brewing Company bought 15000 bushels of malt from the Malting company at \$1½ per bushel. The contract was dated February 19, 1906, and provided that the malt should be shipped as ordered during the season ending December 31, 1906. The malt was not all ordered during that period but afterwards and although malt had increased in price, deliveries were made under the contract at the contract price. It was held that such fact did not constitute an extension of time for the delivery of the malt. But it was held that the contract terminated December 31, 1906. Counsel for plaintiff argue that the case of Hibernian Banking Assn. v. Bell & Zoller Coal Co., 181 Ill. App. 581, is in point. In the instant case the parties by their actions construed their contract as requiring the barrels to be shipped as required and ordered by defendant but not to exceed 400 per day, and 100 half barrels per day and not that number on each particular day covered by the contract. In the Hibernian Bank case, just cited, the contract provided that the coal company should ship nine cars of coal per week from May 21, 1902 until April 1, 1903. The coal company did not deliver nine cars per week, but the number of cars were irregular, some weeks more than nine, some weeks less, and some weeks none at all. The court held that the contract should be construed in the

light of the actions of the parties to mean that nine cars per week on an average should be delivered, and not nine cars each week. In that case the shipments of coal actually made averaged nine cars per week. The suit was brought for damages for failure of the coal company to deliver according to the contract. There an exhibit was offered by plaintiff which was made in the office of defendant and which showed the number of cars shipped and ordered each week, also showing whether the number was "over" or "short", that is, whether there were more or less than nine cars shipped, showing that defendant had interpreted the contract as requiring an average of nine cars per week. The court said, "The whole exhibit shows clearly, too, that defendant in error was at all the times therein noted, posted on the shipments under this contract, and that it recognized that an average of nine cars per week was the requirement of the contract and not nine cars for every week regardless of the overshipments of other weeks, as defendant in error now contends. In the instant case the number of barrels which plaintiff contends the contract called for were, from the very beginning, never delivered. We think the case cited is not in point.

We have examined the other points made by defendant and think they are without merit, but since we have held that the contract construed in the light of the action of the parties does not render defendant liable, it will be unnecessary to state our reasons for holding the other points untenable.

The judgment of the Superior Court of Cook County is reversed.

REVERSED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

260 - 25137

W. L. MOULTON and JOHN MERRILL,
trading as Moulton & Merrill,

Appellees.

APPEAL FROM

COUNTY COURT,

BOON COUNTY.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant.

219 I.A. 639

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiffs brought suit against defendant railroad
company to recover damages for loss to a carload of tomatoes
transported from Merced, California, to Salt Lake City, Utah.
There was a verdict and judgment for \$345.00 in plaintiffs'
favor to reverse which this appeal is prosecuted.

So far as material the facts are these: a refrigera-
tor car was placed at Merced July 9, 1914, for plaintiffs and
loaded by them that day with tomatoes to be shipped to Ogden
Utah. The loading was completed about 6 P.M. of the same day
and at 11.30 that night the car was started for destination.
The following day, July 9, while in transit the car was di-
verted to Salt Lake City. It reached Ogden and was delivered
to the Oregon Short Line Railroad Company at 2:35 P.M. July
11, and was forwarded July 12 at 5:30 A.M. to Salt Lake City
where it arrived two hours later, 7:30 A.M., and was placed
on team track at 3:00 P.M. of the same day. July 12 being
Sunday nothing further was done until the following Monday

morning when the consignee was notified of the arrival. It was stipulated that the car left Merced on the first regular train after loading and that after delivery to the connecting road at Ogden it was transported to Salt Lake City on the first train leaving for that place. The record further shows that the tomatoes were in good condition when loaded and that they were in a damaged condition when the car was opened on July 13 at Salt Lake City. After plaintiffs proved the delivery of the tomatoes to the transportation company in good condition and the receipt of them in Salt Lake City in a damaged condition, and the amount of the damages, they rested. It seems to be conceded that this made out a prima facie case. Plaintiffs' claim seems to be based on the theory that the tomatoes were damaged by reason of the failure of defendant to keep the vents of the car open and the delay in the arrival at Salt Lake City.

Defendant offered evidence tending to show that the car was transported within the usual and customary time and that the air vents of the car were kept open in accordance with the terms of the bill of lading. There is no dispute but that the car furnished was the kind of car ordered by plaintiffs. The car was not to be iced but was to be moved under standard ventilation which in the instant case meant that the vents were to be kept open so as to permit the tomatoes to ripen in transit. Defendant argues that since the undisputed evidence is that the vents were kept open as required the plaintiffs' prima facie case was thus overcome and, therefore, the court should have directed a verdict for defendant at the close of all the evidence. Plaintiffs argue that the witness Enright, for defendant, testified that if the tomatoes when loaded were

in the condition as testified to and "if standard ventilation was observed in transit" the tomatoes would have been in good condition upon arrival at destination and, therefore, this would controvert the other evidence offered by defendant to the effect that the vents were kept open and necessarily present a question of fact for the jury. The contention of counsel for plaintiffs as a matter of law is sound, but it is not borne out by the facts in the record. Nowhere does it appear that the witness Enright testified that if the vents were kept open the tomatoes would have arrived in good condition, nor was he asked any such question. Enright was an inspector of fruit and vegetables for the Illinois Central Railroad and had considerable experience in inspecting various kinds of perishable vegetables including tomatoes. It is clear, therefore, that there was no evidence offered that would in any way dispute that submitted by defendant, viz: that the vents were kept open in transit as ordered, and, therefore, the prima facie case of plaintiffs having been overcome the court should have directed a verdict for defendant.

It was stipulated that if certain persons were called they would testify that the time consumed by this shipment exceeded the schedule time of the fastest trains handling this character of goods over the same route by seven hours and five minutes, but that the time actually consumed by the trains handling this particular car did not exceed the usual and customary running time of the fastest trains handling shipments of the kind between the points in question. There was no evidence to the contrary. It follows that if the car moved at the usual and customary rate of speed of the fastest trains handling tomatoes between the points in question there was no delay in the shipment for which plaintiffs can complain.

Even if there was a delay of seven hours or more there is no evidence of any kind in the record that such delay caused any part of the damage claimed.

Defendant offered in evidence a great deal of testimony and exhibits showing experiments conducted by railroads on shipments of perishable fruits and vegetables with reference to refrigeration, ventilation, etc. This evidence was offered apparently on the theory that plaintiffs should have ordered the car iced as this was the best method to insure the safe transportation of the tomatoes. None of this evidence had any bearing on the instant case. The issue here is whether the plaintiffs were given the kind of service they contracted for, and whether it would have been better to have iced the car is beside the question.

Since the evidence shows without contradiction that the vents in the car were kept open plaintiffs' prima facie case was overcome and the court should have directed a verdict for the defendant.

The judgment of the County Court of Cook County is reversed.

REVERSED.

TAYLOR, P.J. and THOMPSON, J. CONCUR.

367 - 25252

LAJOS STEINER,

Appellant,

v.

CHICAGO TITLE & TRUST
COMPANY, a corporation,

Appellee,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 639

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action of assumpsit against
defendant claiming \$100,000 for loss of commissions, loss
of time and expenses incurred by reason of defendant's breach
of a contract. Plaintiff filed a second amended declaration
consisting of two counts to which a general and special
demurrer was sustained and the suit dismissed at plaintiff's
costs to reverse which plaintiff prosecutes this appeal.
The only question, therefore, for decision is whether either
of the counts states a good cause of action.

Attached to and made a part of the declaration by
reference are a number of exhibits. This is contrary to
the rules of common law pleading. We will, however, endeavor
to pass on the merits of the controversy.

The allegations of the declaration are uncertain,
indefinite and obscure, but as we understand them they are
in substance that on August 1, 1916, defendant, as trustee,
owned or controlled about 54000 acres of land in Colorado,
part of which was east and part west of the Platte River;



that on that date it employed plaintiff to obtain purchasers for the land for which it agreed to pay him a commission of "\$5.00 per acre for all irrigable lands and \$2.50 for non-irrigable lands." He was to advertise the land at his own expense. The contract was for a period of two years. In accordance with the terms of the contract plaintiff proceeded to carry out his part of the agreement by advertising and endeavoring to get purchasers for the land from August 1, 1916, to November 15, 1917, when he learned that defendant would not carry out its contract. Attached to and made a part of the contract was a map showing the land which was located in several townships showing the irrigation system, etc. In the argument at the bar counsel for plaintiff stated that the only complaint made against defendant was its failure to convey irrigated lands; that no complaint was made against it for its failure to convey non-irrigated lands; that the reason defendant did not convey irrigated lands was that the dam of the reservoir of the irrigation system broke thereby releasing all the water so that the land was then not irrigated. He further argued that the contract required defendant to convey irrigated land to purchasers secured by him. It was also urged that the only modification of the contract of August 1, 1916, was that plaintiff should first sell the land west of the Platte River before proceeding to sell that east of the river.

We think counsel's argument is untenable because there is nothing in the contract to indicate that the land is irrigated or that it would remain so. For it expressly provides for the conveyance of "irrigable lands" and not that the land should actually be irrigated at the time of

conveyance. Furthermore, the modification of the contract, dated September 15, 1916, expressly provides that if any purchaser of the land is unable to make first payment on account of a total failure of crops due solely "to the failure or inability of The Farmers Reservoir and Irrigation Company to supply the purchaser with a quantity of water reasonably sufficient to prevent such failure", then plaintiff shall not be required to obtain another purchaser. This clearly shows that there was no provision in the agreement that defendant should maintain the land as irrigated. Plaintiff in fact, shows that no such obligation was assumed by it.

The damages claimed by plaintiff could not be recovered even if there were a valid and binding contract. He seeks to recover commissions, compensation for the time he spent in endeavoring to sell the lands, and the money expended by him. Of course, if the contract were carried out, the most plaintiff could recover would be his commissions, and he is apparently endeavoring to enforce the terms of the contract in this action. In these circumstances he could not recover anything for the labor he had expended nor the money spent. If he were seeking to recover for these latter two items it would have to be on the theory that the contract was rescinded and at an end. In no view of the case does the declaration state a cause of action. Whether plaintiff has a good cause of action for any part or all of his claim as commission, labor or money expended, we do not decide for the reason that the only matter before us is whether the declaration states a legal cause of action. We hold that it does not and the demurrer, therefore, was properly sustained and the suit dismissed.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

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The thirty-third is the fact that the system is not in equilibrium.

THE PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,

v.

GEORGE OVERHOLT,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

219 A. 340

MR. JUSTICE O'BONNOR delivered the opinion of the court.

By this writ of error the defendant, George Overholt, seeks to reverse a judgment of the Municipal Court of Chicago finding him guilty of contributing to the delinquency of a child contrary to sec. 42, h.n., Ch. 38 R.S., and imposing a sentence of one year in the House of Correction and a fine of \$200. We have before us only the common law record, the evidence not being preserved by bill of exceptions. And the sole question to be determined is whether the information charged defendant with the commission of the crime for which he was convicted.

The sworn information which was filed by leave of court is as follows: "Gatherine M. Shannon, a resident of the City of Chicago, in the State aforesaid, in his own proper person, comes now here into court, and in the name and by the authority of The People of the State of Illinois, gives the Court to be informed and understand that George Overholt heretofore, to wit, on the 13th day of June, A.D. 1919, at the City of Chicago, aforesaid, did then and there willfully and unlawfully and knowingly encourage a minor

child under the age of 18 years, towit, Louise Sladek, to become a delinquent child by inducing her to remain away from her home in violation of section 42 N.M. chapter 38 Revised Statutes of the State of Illinois contrary to the form of the Statute in such case made and provided and against the Peace and Dignity of the People of the State of Illinois."

It is elementary that an information like an indictment must allege all the facts necessary to constitute the crime with which the defendant is charged. People v. Stoyan, 280 Ill. 300; People v. Seward, 284 Ill. 588. If it fails to do so it is insufficient to sustain a judgment even after a plea of guilty. Klavanaki v. People, 218 Ill. 481. A delinquent child is defined by the legislature in the section above cited as follows: "A delinquent child is any male who, while under the age of seventeen (17) years, or any female child, who, under the age of eighteen (18) years, violates any law of this State or is incorrigible and knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian and custodian absents itself from its home or place of abode", etc. It will be noticed that the information in the instant case charges that the defendant encouraged Louise Sladek to become a delinquent child "by inducing her to remain away from her home in violation of Section 42 N.M., chapter 38, Revised Statutes of the State of Illinois." We think no one would say that if the defendant was charged merely with the violation of this section of the Statute, that such charge would be sufficient. The information does not charge that defendant induced her to remain away from her home "without just cause and without the consent of its parents, guardian

or custodian." For aught that appears the inducement might have been with the consent of the child's parents. The Klawanski case is very similar to the case at bar and is authority for the conclusion we have reached. There Klawanski was indicted for forging as true and genuine a complimentary theatre pass with intention to defraud. He was arraigned, plead guilty, and sentenced to the penitentiary. A writ of error was sued out and the Supreme Court held the indictment fatally defective. In that case sec. 105 of the Criminal Code, for the violation of which defendant was found guilty provided that every person who should falsely make, alter, forge or counterfeit any theatre ticket or pass for the admission of any person to an entertainment for which a consideration was required should be imprisoned in the penitentiary, etc. The indictment did not allege that an admission fee was charged for the entertainment for which the forged ticket was issued. The court, therefore, held the indictment fatally defective and insufficient to sustain the conviction even after a plea of guilty. In the instant case we think the information is so fatally defective that it will not sustain the conviction although no motion to quash was made.

Since the information may be amended, (People v. Ellis, 185 Ill. App. 417) the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

INTERNATIONAL GRAND LODGE, BROTHER-
HOOD OF RAILROAD PATROLMEN, et al.

Appellees,

v.

CHARLES E. COPELAND, et al.

Appellants.

) INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

JOHN COUNTY.

2191A. 640

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal defendants seek to reverse an inter-
locutory order granting a writ of injunction.

The record, shortly, discloses that on April 19th
1920, the International Grand Lodge, Brotherhood of Rail-
road patrolmen, and other parties filed their bill of com-
plaint against Charles E. Copeland and others praying for
an injunction, accounting and other relief. Afterwards on
May 13th, 1920, by leave of court, an amended bill of com-
plaint was filed and on May 20th on motion of complainants
after notice and a hearing it was ordered that a writ of
injunction issue restraining the defendant Charles E. Cope-
land from acting as president of the complainant association
and further enjoined him and other defendants from interfer-
ing with certain of the complainants in the discharge of
their duties as officers of the complainant association.

The bill and the amended bill were both verified
and the matter came on for hearing on the face of the amended



bill and, therefore, the material allegations of it are admitted to be true. Spiegler v. City of Chicago, 216 Ill. 114. The material allegations of the amended bill being admitted as true it makes no difference whether the bill was verified or not. Fowler v. Fowler, 204 Ill. 32; Keach v. Hamilton, 84 Ill. App. 413; Gudgeon v. Sney, 62 Ill. App. 599; Hopkins Amusement Co. v. Frohman, 202 Ill. 541. From this it follows that the objection made by defendants to the verification are in no way material on this appeal.

The bill and amended bill were very badly drawn. Some of the allegations are conflicting and many of them are difficult to understand at all. But the substance of the charges made were that the International Grand Lodge, Brotherhood of Railroad Patrolmen is an unincorporated voluntary association made up of a grand and subordinate lodges some of the objects of which are as stated in the constitution, to exalt the character and increase the ability of railroad patrolmen and to advance the interests of such patrolmen for the benefit of themselves and to benefit the employers of them; to alleviate distress among sick and disabled members, to bury deceased members and to provide for the widows and orphans of deceased members; that the Grand Lodge has issued charters to approximately forty two subordinate lodges and that the membership is about 3,000; that the organization is supported by dues collected from members, etc. The bill further sets up that certain officers are provided by the constitution for the conduct of the business of the association, and it is then averred that the defendant, Charles E. Copeland, is assuming to act as president of the association without authority; that he has never been elected

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president; that he is receiving funds and has possession of property belonging to the association and is converting the funds to his own use; that he is preventing certain of the complainants who are officers of the association from performing their duties. The bill prays that Copeland be enjoined from assuming to act as president and that there be an accounting and that he be decreed to pay whatever is found to be due and owing from him to the association.

Defendants argue that equity has no jurisdiction to interfere in the case for the reason that even if Copeland were not acting according to the rules and regulations of the order, this would be a matter to be taken up and disposed of as provided in the by-laws and constitution of the association, and since these steps have been taken equity has no jurisdiction. It is an elementary principle that the jurisdiction of a court of equity may be invoked to prevent fraud, and in the instant case, since the allegations of the amended bill, which are here admitted to be true, charge that Copeland is assuming to act as president when he has never been elected such and that he is collecting the funds of the association and converting them to his own use, it is such a fraud as will be enjoined, and this, too, without regard to the solvency or insolvency of Copeland. The writ also enjoined Copeland from interfering with certain of the complainants who are alleged to be officers of the Brotherhood, in the discharge of their duties. This was justified under the allegations since it is averred that these complainants, who are officers of the association, have been prevented by Copeland from discharging their duties.

Complaint is also made that the amended bill sets up matters that occurred after the filing of the original bill and it is contended that this can only be done by supplemental

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bill and not by amended bill. Since no answer was filed to the original bill it was proper to make such allegations by way of amendment. Sec. 885 Story's Eq. Pl. (9th ed.); 21 May. PL. & Pr. p. 10; Luft v. Grossau, 31 Ill. App. 531. Story, in the section cited, says, "But the matter introduced by amendment must not be matter which has happened since the filing of the bill (which is termed new matter) unless, indeed, the defendant has not put in his answer, in which case the bill may be amended by adding supplemental matter."

The order of the Superior Court of Cook County is affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

319 - 25197

HEYWORTH GRAMAM CO.,
a corporation,

Appellant.

v.

WILLIAM L. LEWIS,

Appellee.

APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

219 I.A. 640

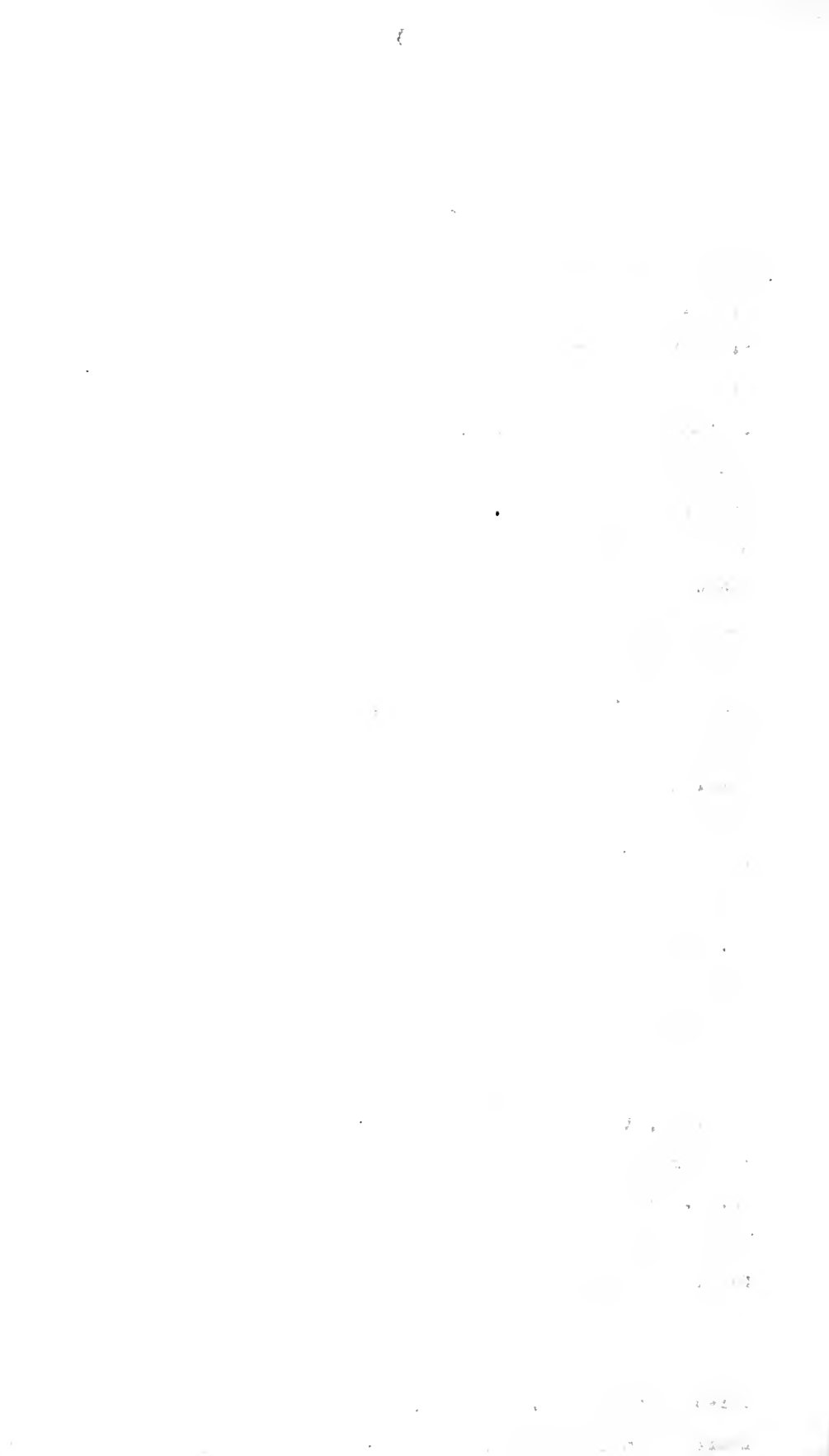
MR. JUSTICE THOMSON delivered the opinion of
the court.

The plaintiff corporation brought this suit on
a promissory note executed by the defendant and by him
delivered to the plaintiff. The case was submitted to
the court without a jury and after the evidence was heard
the court found the issues for the defendant and entered
judgment accordingly, from which the plaintiff has perfected
this appeal.

The plaintiff was in the business of furnishing
light, heat, power and janitor service to office buildings
in the City of Chicago. It entered into a contract for the
rendering of such service with the defendant and two others
as individuals, who were the owners of a certain building.
A corporation known as the Wm. L. Lewis Co. became a tenant
in that building and the plaintiff furnished service to that
corporation. From time to time the plaintiff rendered bills
for this service, to the corporation, which bills were paid by
it. Subsequently the corporation got into financial difficulties

and failed to pay its bills and the defendant, Lewis, the president of the corporation, undertook to effect a composition with the creditors, including the plaintiff. At this time the plaintiff had rendered bills to the corporation to the extent of \$925.00, which remained unpaid. The defendant testified that when he approached Mr. Graham, of the plaintiff company, with reference to the composition, he refused to become a party to it. The composition proposed was on the basis of a payment of 20 per cent to all the creditors of the Wm. L. Lewis Co. The defendant further testified that Graham stated that he would accept the corporation's check for 20 per cent of the amount of his claim provided the defendant gave the plaintiff his personal note for the balance, to which proposition the defendant finally agreed. He accordingly executed his note to the order of the plaintiff in the sum of \$740.00, which was the note here sued upon. The check of the Wm. L. Lewis Co. for the other 20 per cent of the plaintiff's claim was duly delivered to the plaintiff and accepted by it and the plaintiff signed the composition agreement.

In urging that the judgment of the trial court be reversed, the plaintiff first contends that the defendant was personally liable to it for the services rendered the Wm. L. Lewis Co. under and by virtue of his execution of the contract into which he entered, as above described. Counsel for the plaintiff asked the defendant certain questions while he was on the stand, the effect of which may be said to be that the services covered by the bills in question were rendered to the Wm. L. Lewis Co. under the contract signed by Lewis as an individual. From all the evidence, however, it

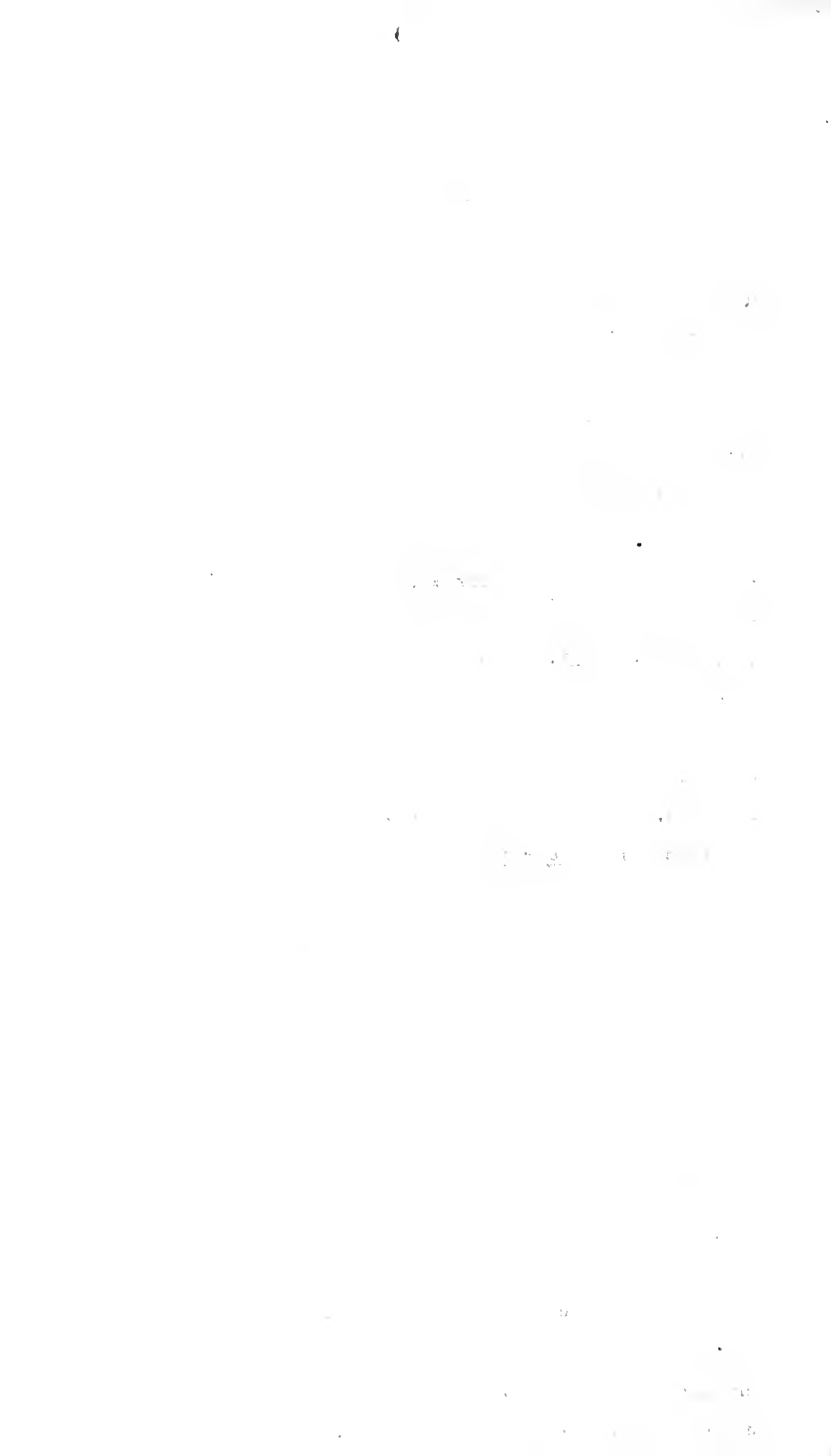


seems clear that such was not the case. The plaintiff rendered bills to the Wm. L. Lewis Co. for the services rendered and at the time of the composition and the transactions in connection with it, it was apparent that neither the plaintiff nor the defendant considered that the defendant was liable for such services under the contract but both of them treated the indebtedness for such services as the indebtedness of the Wm. L. Lewis Co. If the plaintiff had regarded the contract, to which the defendant was a party, as an individual as being in force and covering these services, it would certainly not have entered into the composition agreement for 20 per cent of the plaintiff's claim and demanded the defendant's note for the balance. It is further evident that the plaintiff at that time did not consider the defendant liable for these services under the contract, for, according to the defendant's testimony, the plaintiff expressly put the consideration of the defendant's note, not upon the contract, but upon the plaintiff's becoming a party to the composition agreement.

The plaintiff further contends that even though the consideration for the note was based upon its execution of the composition agreement, such consideration was a valid one inasmuch as it did not diminish the assets of the Wm. L. Lewis Co. in any way and thus worked no harm upon the other creditors of that company. In our opinion that fact was immaterial. Where a creditor enters into a composition agreement with other creditors and with the debtor, thereby agreeing to accept a pro rata share of the assets of the debtor in payment of his claim and at the same time secretly secures to himself some advantage over the other creditors, the trans-

action is fraudulent, and where the advantage thus secured by the creditor is in the form of a note for the balance of the creditor's claim, even though that note be the note of one other than the debtor, the consideration for the note is considered fraudulent and the creditor will not be permitted to recover in an action brought upon that note. That such a transaction will nullify the composition agreement was held by our Supreme Court in Hafter v. Cain, 73 Ill. 296. To the same effect are Morrison v. Schlessinger, 10 Ind. App. 665 and Bank of Commerce v. Bosher, 57 Am. Rep. 358. In Solinger v. Barie, 82 N.Y. 393, it was held that where such a note was given and later transferred to a bona fide holder by the creditor and the maker of the note was compelled to pay it, he could sue the creditor and recover the amount he had paid. In that case the court said, "If the composition provides for a pro rata payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his pro rata share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and each creditor."

It can make no difference that the giving of the note, pursuant to the secret arrangement, did not diminish the assets of the debtor. In Frost v. Cagg, 3 Allen (Mass.) 560, a creditor who had secured a secret preference, sought to recover a dividend due under the composition and the court held that there could be no recovery, saying, "It is quite immaterial that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agreement. The fraud consists,



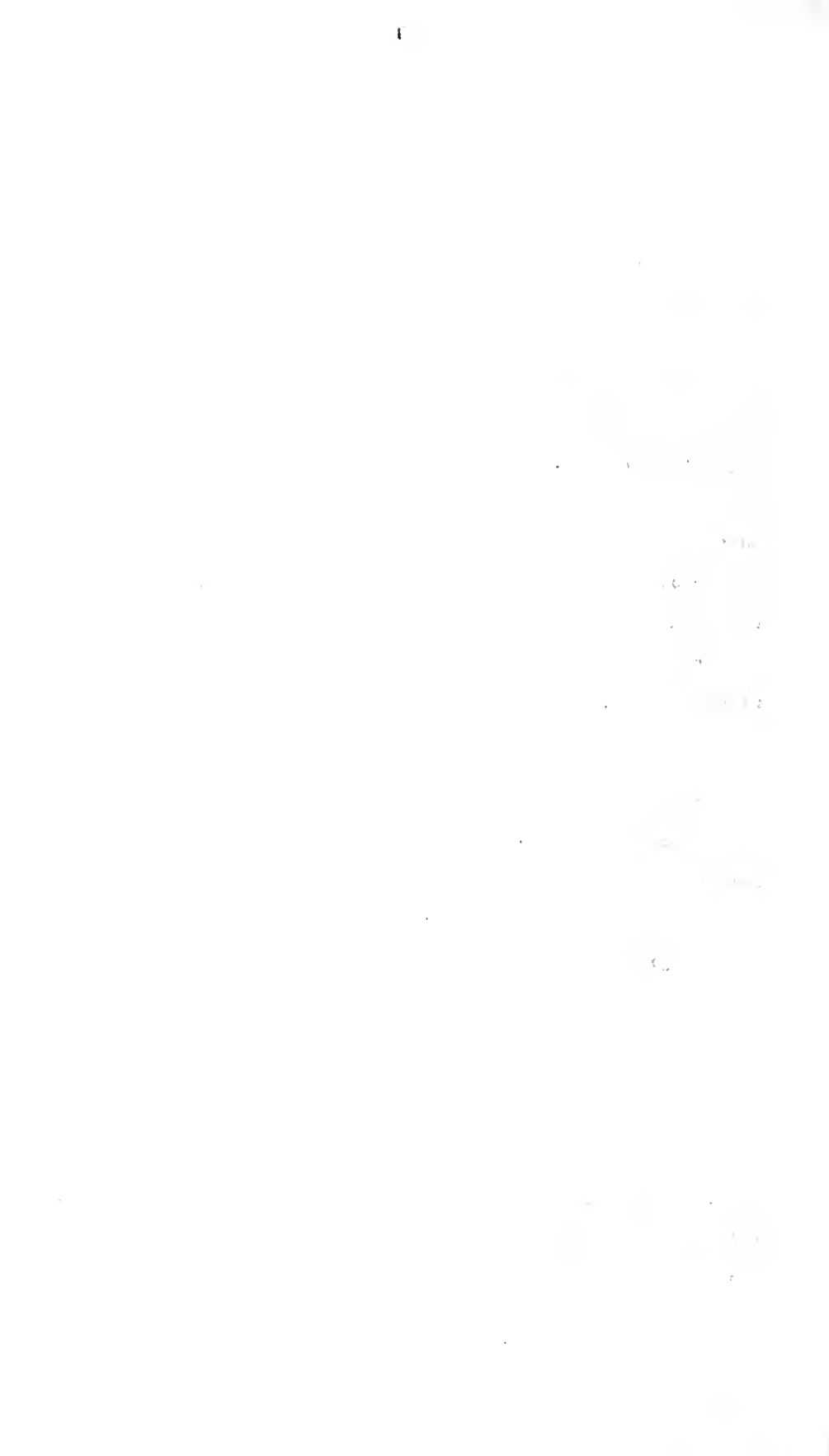
not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors." In Gilmour v. Thompson, 49 How. Pr. 193, the plaintiff debtor made a composition with his creditors, one of whom was the defendant. As a consideration for entering into the composition the defendant required the plaintiff to give him his note for a sum over and above the amount that was to be paid under the composition. The defendant transferred the note to a third person, to whom the plaintiff was obliged to pay it. The plaintiff then sued the defendant to recover the sum thus paid by him and the court held he was entitled to recover.

In support of its contention that even in this theory there was a valid consideration for the defendant's note, the plaintiff relies on Loddell v. State Bank of Newee, 180 Ill. 56. That case, however, is not in point for it appears there that the creditor in question refused to join with the other creditors in an arrangement whereby certain lands of the debtor were to be transferred to a trustee and liquidated for the benefit of all creditors, and its position was well known to the other creditors. In that case the arrangement whereby the preferred creditor secured its preference was unknown to the other creditors, but it appeared that the creditors who agreed to accept the benefits of a trust were not in any measure induced to do so by any thought that the preferred creditor was a party to the trust



arrangement on the same basis as all the creditors. The court said that the situation "might have been different had the appellee (preferred creditor) secured payment in full and then, concealing this fact, induced other creditors to join in this trust scheme, for a proposed equal or pro-rata division. But no element of that kind entered into the case. Appellee did nothing more than to lawfully obtain outside security for the balance of its debt without injury to the other creditors and then, at their solicitation, entered into an agreement to take, sell and distribute pro rata the property which those creditors * * * had urged it to agree to take."

We agree with the plaintiff's contention that it was incumbent upon the defendant to show in this case that the other creditors were induced, at least in part, to enter into this composition by reason of the fact that the plaintiff was a party to it on the same basis with them, but we do not agree with the contention that the evidence was totally silent as to whether the creditors of the Wm. L. Lewis Co. were so influenced or whether or not they knew that the plaintiff had entered into the composition, only upon receiving a note from the defendant for the balance of its claim, over and above the amount it was to receive under the composition. The composition agreement duly executed by the plaintiff together with the other creditors recites that they, "In consideration of the insolvency of the Wm. L. Lewis Co. and of payment to us of twenty per cent (20%) of the amount of our respective claims in cash, do hereby jointly and severally agree with the said Wm. L. Lewis Co. and its officers, and with each other and with all creditors of said company,



signing likewise counterpart agreements, that we will, and do hereby accept of and from said Dr. L. Lewis Co., in full payment, liquidation and discharge of our claims against said company, twenty per cent (20%) of the amount thereof payable in cash." The defendant testified that at the time of his transaction with the plaintiff, involving the giving of his note and the plaintiff's agreement to become a party to the composition, he had "secured all the signatures but the local creditors." In our opinion this made out at least a prima facie case to the effect that in entering into the composition agreement, at least some of the local creditors were influenced by the fact that all the other creditors, including the plaintiff, were doing likewise. The composition having been induced, at least in part, by the fact that all creditors including the plaintiff were becoming parties to it; and the note in question amounting to a secret preference to the plaintiff, we are of the opinion that it was given for an invalid consideration and that the plaintiff cannot recover upon it.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = \int_0^x f(t) dt$. It is shown that $f(x)$ is a continuous function and that it satisfies the differential equation $f'(x) = f(x)$. The solution of this equation is $f(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $f(0) = 1$, which gives $C = 1$. Therefore, the function $f(x)$ is $f(x) = e^{x^2/2}$.

2. In the second part of the paper, we study the properties of the function $g(x)$ defined by the equation $g(x) = \int_0^x g(t) dt$. It is shown that $g(x)$ is a continuous function and that it satisfies the differential equation $g'(x) = g(x)$. The solution of this equation is $g(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $g(0) = 1$, which gives $C = 1$. Therefore, the function $g(x)$ is $g(x) = e^{x^2/2}$.

3. In the third part of the paper, we study the properties of the function $h(x)$ defined by the equation $h(x) = \int_0^x h(t) dt$. It is shown that $h(x)$ is a continuous function and that it satisfies the differential equation $h'(x) = h(x)$. The solution of this equation is $h(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $h(0) = 1$, which gives $C = 1$. Therefore, the function $h(x)$ is $h(x) = e^{x^2/2}$.

4. In the fourth part of the paper, we study the properties of the function $k(x)$ defined by the equation $k(x) = \int_0^x k(t) dt$. It is shown that $k(x)$ is a continuous function and that it satisfies the differential equation $k'(x) = k(x)$. The solution of this equation is $k(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $k(0) = 1$, which gives $C = 1$. Therefore, the function $k(x)$ is $k(x) = e^{x^2/2}$.

5. In the fifth part of the paper, we study the properties of the function $l(x)$ defined by the equation $l(x) = \int_0^x l(t) dt$. It is shown that $l(x)$ is a continuous function and that it satisfies the differential equation $l'(x) = l(x)$. The solution of this equation is $l(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $l(0) = 1$, which gives $C = 1$. Therefore, the function $l(x)$ is $l(x) = e^{x^2/2}$.

6. In the sixth part of the paper, we study the properties of the function $m(x)$ defined by the equation $m(x) = \int_0^x m(t) dt$. It is shown that $m(x)$ is a continuous function and that it satisfies the differential equation $m'(x) = m(x)$. The solution of this equation is $m(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $m(0) = 1$, which gives $C = 1$. Therefore, the function $m(x)$ is $m(x) = e^{x^2/2}$.

7. In the seventh part of the paper, we study the properties of the function $n(x)$ defined by the equation $n(x) = \int_0^x n(t) dt$. It is shown that $n(x)$ is a continuous function and that it satisfies the differential equation $n'(x) = n(x)$. The solution of this equation is $n(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $n(0) = 1$, which gives $C = 1$. Therefore, the function $n(x)$ is $n(x) = e^{x^2/2}$.

8. In the eighth part of the paper, we study the properties of the function $o(x)$ defined by the equation $o(x) = \int_0^x o(t) dt$. It is shown that $o(x)$ is a continuous function and that it satisfies the differential equation $o'(x) = o(x)$. The solution of this equation is $o(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $o(0) = 1$, which gives $C = 1$. Therefore, the function $o(x)$ is $o(x) = e^{x^2/2}$.

9. In the ninth part of the paper, we study the properties of the function $p(x)$ defined by the equation $p(x) = \int_0^x p(t) dt$. It is shown that $p(x)$ is a continuous function and that it satisfies the differential equation $p'(x) = p(x)$. The solution of this equation is $p(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $p(0) = 1$, which gives $C = 1$. Therefore, the function $p(x)$ is $p(x) = e^{x^2/2}$.

10. In the tenth part of the paper, we study the properties of the function $q(x)$ defined by the equation $q(x) = \int_0^x q(t) dt$. It is shown that $q(x)$ is a continuous function and that it satisfies the differential equation $q'(x) = q(x)$. The solution of this equation is $q(x) = Ce^{x^2/2}$, where C is a constant. The value of C is determined by the initial condition $q(0) = 1$, which gives $C = 1$. Therefore, the function $q(x)$ is $q(x) = e^{x^2/2}$.

322 - 25200

JOHN F. PLONCZYNSKI, minor by John
Plonczynski, his next friend.

Appellee.

v.

CONSUMERS COMPANY, a corporation.

Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

219 - 640

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a personal injury action tried before a jury, resulting in a verdict for the plaintiff, fixing his damages at \$800. By this appeal the defendant seeks to reverse the judgment for that amount.

The defendant complains of the conduct of the trial court during the trial, certain of the court's rulings on questions put to members of the jury, and also of certain rulings on the admission of evidence and on instructions and the action of the court in denying its motion for a new trial. We do not deem it necessary to pass upon the latter point but, as a new trial must be had on other grounds, we shall refer to the matters of procedure complained of.

At the opening of the trial and as counsel were about to select the jury, the court announced that he did "not permit lawyers, to ask jurors if they would be willing to accept twelve men to try the case who would be in the same frame of mind that this juror is in. The jurors need not answer that sort of a question and you may take

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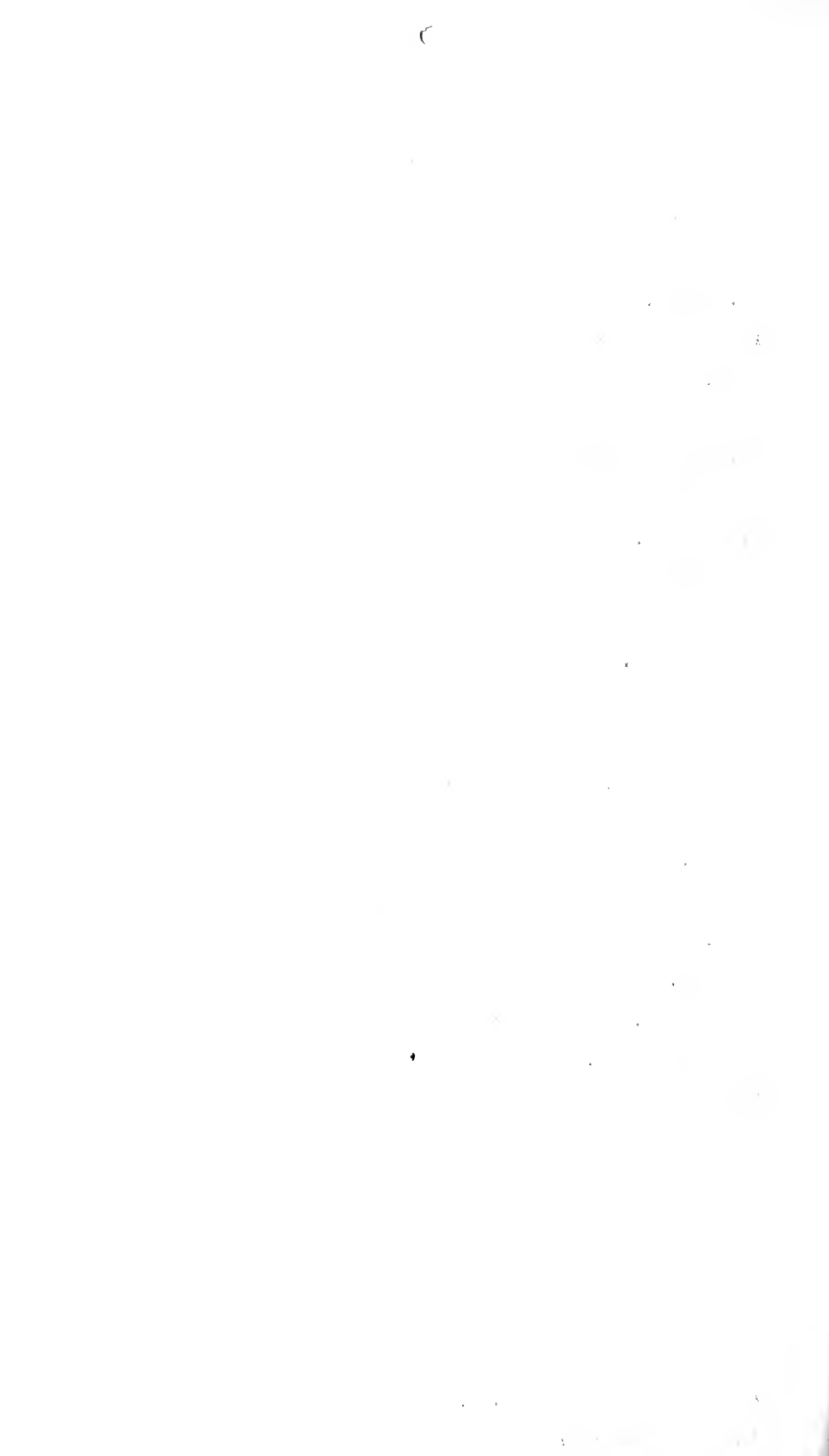
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your exception." As we have previously had occasion to point out (Gentry v. Chicago & Alton Ry. Co. Ill. App. First District, No. 24173, opinion filed July 16, 1919, not yet reported) that is a perfectly proper subject of inquiry in selecting a jury provided the question putting it, is correctly worded. In the course of the examination of the jury in the case at bar counsel for defendant asked a juror, "If you were the defendant in this suit would you be willing to have a man in your present frame of mind sit as a juror in this case and pass upon the issues?" That obviously is an improper question. The juror might be strongly prejudiced in favor of the defendant for some reason, and in that event his answer would of course be in the affirmative, and therefore satisfactory to counsel for the defendant and yet he would be the kind of a juror who should not sit in the case. On the other hand a question worded as the question was in the case cited, is entirely proper, and counsel should be permitted to put it and the juror required to answer it. There the question was as follows: "If you were in my place, representing the railroad company, and you wanted to get twelve fair minded men to try the issues, would you take a man who is in the frame of mind you are in now, on a jury to try the issues in a case of this kind?"

Another question put to one of the jurors in the case at bar was the following, "Do you think that regardless of the fact that plaintiff is a boy of sixteen and defendant a corporation, you would require him to make the same proof as to liability for the accident as you would if he were a grown man?" It would have been quite proper to ask the juror if he could be as fair, unbiased and impartial in deciding this case as he could be if the plaintiff were a grown man,



or something to that effect, but in our opinion the question put, as above quoted, was objectionable. It would be quite likely that a juror would get the impression at the outset of the trial, from such a question, that the plaintiff was required to make the same showing as to the exercise of care on his part as he would if he were an adult, although technically and strictly, the question might not bear that interpretation.

The court also refused to allow the jurors to answer the following question: "Do you understand what is meant by preponderance or greater weight of the evidence?" That is a proper question and the court's ruling upon it was not correct. While a juror may not be required to have a knowledge of technical legal terms, he should be able to understand the English language and such plain terms as are met with in the trial of every case.

On September 7, 1917, the plaintiff was crossing 88th street in the City of Chicago, on the west side of Commercial avenue. It was raining hard. He was carrying his sister, a child of six or seven years, on his left arm. They were both covered by a rain coat and he was also carrying an umbrella. As they were proceeding across 88th street and apparently after they had passed the middle line of that street, they were struck and knocked down by a team drawing a wagon. They fell between the horses and, after the wagon had passed, a woman who was on the corner at the time, picked up the little girl and carried her home, and the plaintiff got up and went to their home, which was near by, himself. We gather from the record that the girl was not injured but the plaintiff had been struck on one of his legs and received



the injury here sued upon. The wagon was described as a yellow wagon, with high sides but no top and it was covered over with a canvas tarpaulin. There was testimony for the plaintiff to the effect that the defendant's name appeared on the wagon, one witness testifying that he saw the words "Consumers Ice Company" on it. The following day he was called to the stand and he then testified that the name on the wagon was "Consumers Company". The wagon had come from the south along Commercial avenue and turned west into 83th street when it struck the plaintiff. The accident occurred at 11:30 A.M. as the plaintiff was carrying his sister home from a neighboring parochial school.

In addition to a plea of the general issue, the defendant filed a plea of non-ownership and the main question involved in the case was whether the wagon in question was in fact one of the defendant's or belonged to others, as defendant claimed.

The plaintiff's declaration, as originally filed, consisted of three counts. The first charged general negligence. The second alleged the violation of a city ordinance, prohibiting driving around a corner at a speed greater than four miles an hour. The third alleged that the neighborhood in question was thickly populated, and charged that defendant had failed to give any notice or warning of the approach of the wagon. During the trial the court permitted plaintiff to file an additional count reciting the violation of a city ordinance requiring the driver of a vehicle to give a signal by raising his hand in rounding a corner. This action of the court is also complained of. As the application to file this additional count was not supported by any show-

Figure 1. The effect of the number of trials on the number of correct responses. The number of correct responses was significantly higher for the 10-trial condition than for the 5-trial condition. Error bars represent the standard error of the mean.

ing of diligence and no excuse was given for the delay in filing it, the application might well have been denied, but on the other hand we do not consider the exercise of the court's discretion, in permitting the plaintiff to file it, as error. Certainly the defendant's defense could not have been prejudiced by the filing of this additional count.

During the cross-examination of the plaintiff, counsel for defendant asked him, "Your recollection of what the wagon was, is largely based on your examination made over in the Consumers' yard?" That question might better have been put in the form of a question and not a statement, but it was not argumentative as stated by the court in sustaining plaintiff's objection to it. It was a proper subject of cross-examination. The plaintiff was covered up with a rain coat and an umbrella at the time of the accident. The wagon itself was covered by a canvas covering, thrown over it, and it was moving rapidly. Several days later the plaintiff and his mother had visited the defendant's yard and examined its wagons. The plaintiff had not previously answered the question, as his counsel contends. When the question was first asked, counsel for defendant added another question to it, namely, "You looked it over carefully didn't you?" The plaintiff said he had, and then the question referred to was repeated and the plaintiff answered, "It is the same wagon". Counsel for defendant then said, "Answer the question." and again repeated it in substance, whereupon the court ruled it out as argumentative although no objection had been interposed by the plaintiff.

One of the plaintiff's witnesses who had given testimony about the name on the wagon that struck the plaintiff, to which we have referred, testified that he was Polish. He gave

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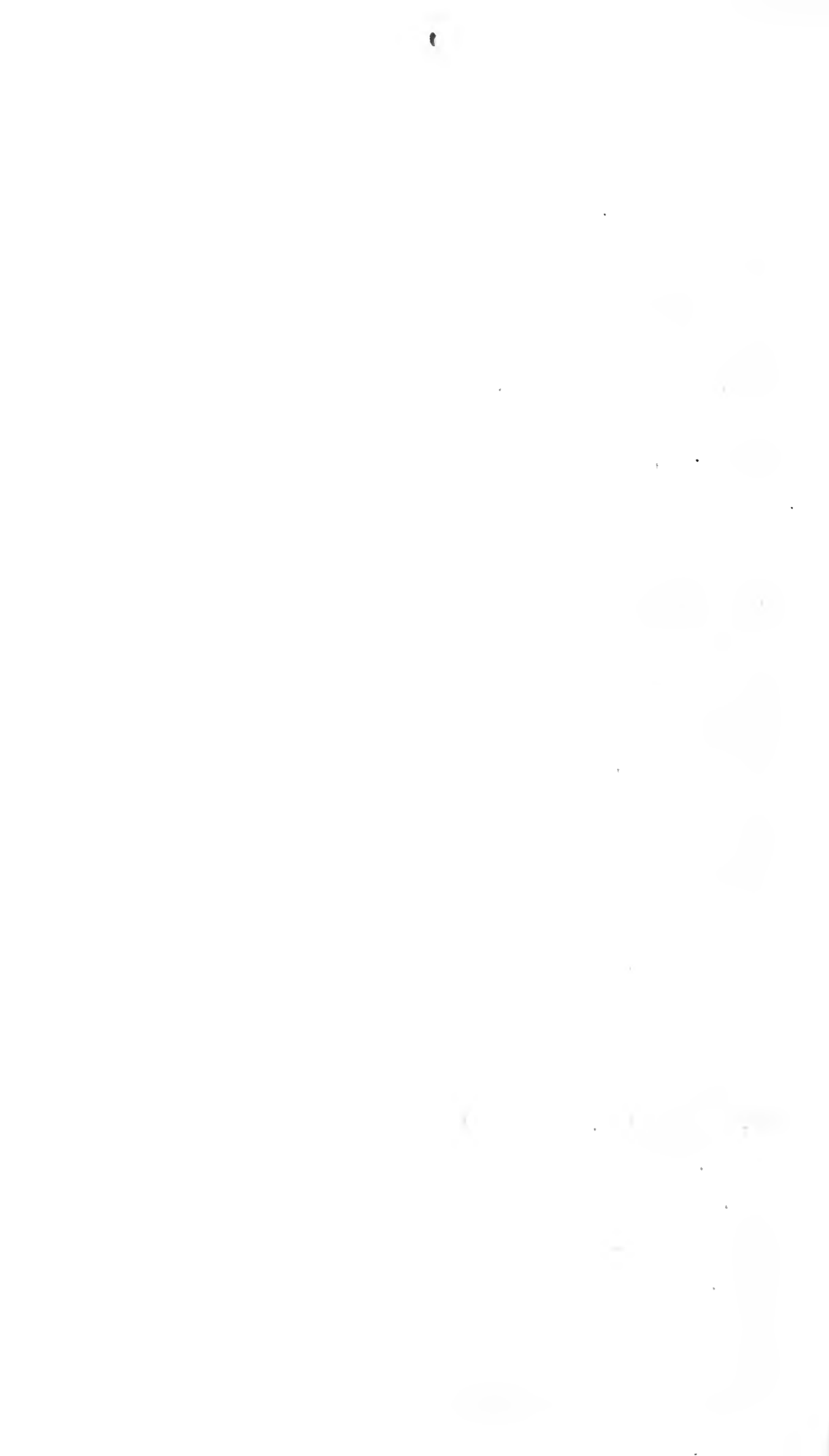
1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

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his name as Bishop. On cross-examination he was asked if Bishop was a Polish name. No objection was interposed to the question but the court said it made no difference whether his name was "Jones, Smith, Bishop or Bishopsky or anything else," and ruled it out. The question was proper. It was apparently a preliminary question and might have led to a line of inquiry touching the credibility of the witness.

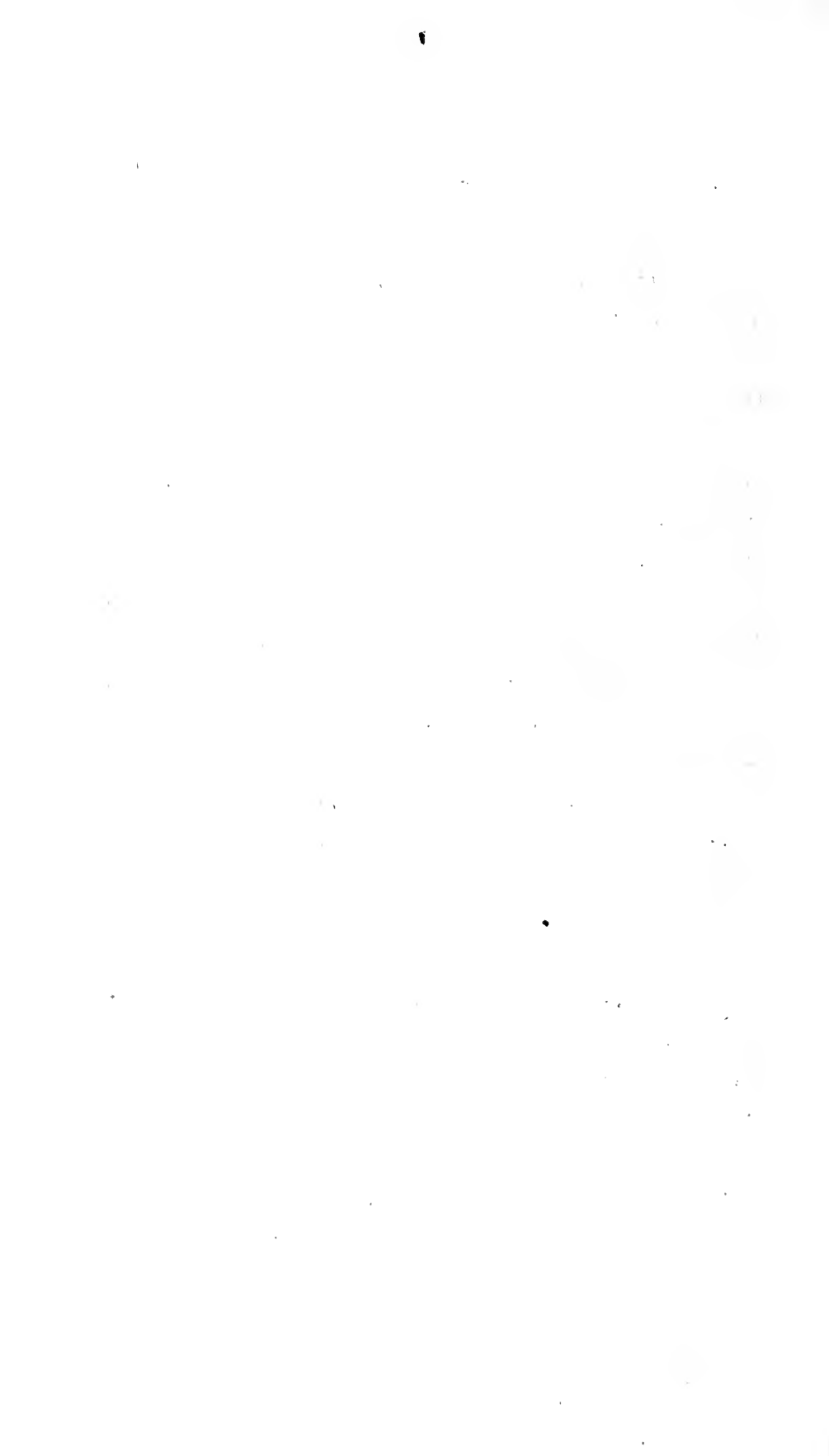
From affidavits presented to the court in support of the motion for a new trial, it appears, that defendant's investigator had made some fifteen trips into the vicinity of this accident in search of witnesses and its defense had been prepared with such witnesses as had been found. At the close of the first day of the trial, the investigator Carlson, took two boys, who were witnesses, home, and in talking with the mother of one of them, he learned of others who might know about the accident and in following up this information he found one Wyrobek. After talking with him he served him with a subpoena, and the following morning he was a witness at the trial. He testified he had been a teamster on an express wagon and on bottle bear wagons,- "Then I worked on an ice wagon for Chris Chirbobba." He was asked whether he was driving a wagon in Chicago on or about September 7, 1917, and he answered, "I couldn't just say if it was that date or not, but I have been driving for Chris Chirbobba at that time." He testified further that he was driving a yellow express wagon, "with stakes up that stand about five feet high"; that he had two horses, a bay and a sorrel; that he didn't remember the date; that "I haven't no accident at all only just that little kid fell upon me, in front of me when I pulled from 88th to west of 88th street to Macanaba." Without



any objection being interposed the court ordered this testimony stricken out because he could not "see any connection." Counsel for defendant assured the court that he would connect the testimony up, and he proceeded to ask another question and the court interrupted him and refused to let him proceed. The witness then testified that he knew the plaintiff; that he was hauling some barrels of whiskey; that he drove east on 92nd street, came to Commercial avenue, "and then that was west around the corner to 88th and north, and north of 88th, I was going west, and there was a bunch of little kids coming out of church between eleven and twelve o'clock, that day and I swung my team coming in off west to 88th and Keanaba avenue, and the kid come with an umbrella * * * it was raining * * * and I hollered at the kid, and that time I swung the team over off of 88th north, and the kid fell just beside of my team, and I drove away about a block and come back to see if that kid was hurt * * * and he wasn't there." He further testified that he had a tarpaulin over his wagon; that he didn't know who the boy was. He was then asked if it was the plaintiff and he answered, "Why, I couldn't say now," and later he answered, "He ain't the boy at that time." This the court struck out although no objection had been interposed and the court then asked him if the plaintiff was the boy that fell in front of his team and he answered, "Why, I couldn't see the boy's face because he had an umbrella over him"; he said he could not see whether he was carrying anybody in his arms because of the umbrella; that it was between eleven and twelve o'clock on a rainy day; that he could not give the date or the month; that it was in the winter. Thereupon the court said (no objection having been interposed by plaintiff) "Strike it all out." Counsel for defendant said



he would connect up the testimony of this witness with another witness. The court said, "No you cannot." Counsel for defendant offered to show that immediately after the accident the witness had testified about, he had told another about it (the other witness referred to) and he told the court this witness would also corroborate Wyrobek as to his movements on the day in question. In testifying about the boy involved in the accident he was describing, Wyrobek referred to him as "the little fellow", whereupon the court asked him how tall he was and he indicated about four and a half or five feet. The court then asked how old the boy was and the witness answered, "Six or seven years, I guess," whereupon the court said, without objection to the evidence being made on the part of the plaintiff, "Strike it all out,- all is stricken out,- you will pay no attention to it." Later the examination of the witness recurred to the time of the accident the witness had described and the court asked, "You said it was winter?" and the witness answered, "Well, it was a kind of slippery day,- it was raining." The court then asked him if it was snowing and he said no it was raining and frozen. After some further questioning the court said, "I don't see the necessity of spending time upon this, because it is all stricken out * * * there is no connection shown between this man's statement and this accident." Defendant contended that there was some connection but the court said, "It is all stricken out." Counsel for defendant then said, "I want to make this offer to prove that the man -," whereupon the court interrupted and said, "No, I won't let you make any offer to prove anything. You have asked your questions and I have heard them. If you have any further questions, ask them."



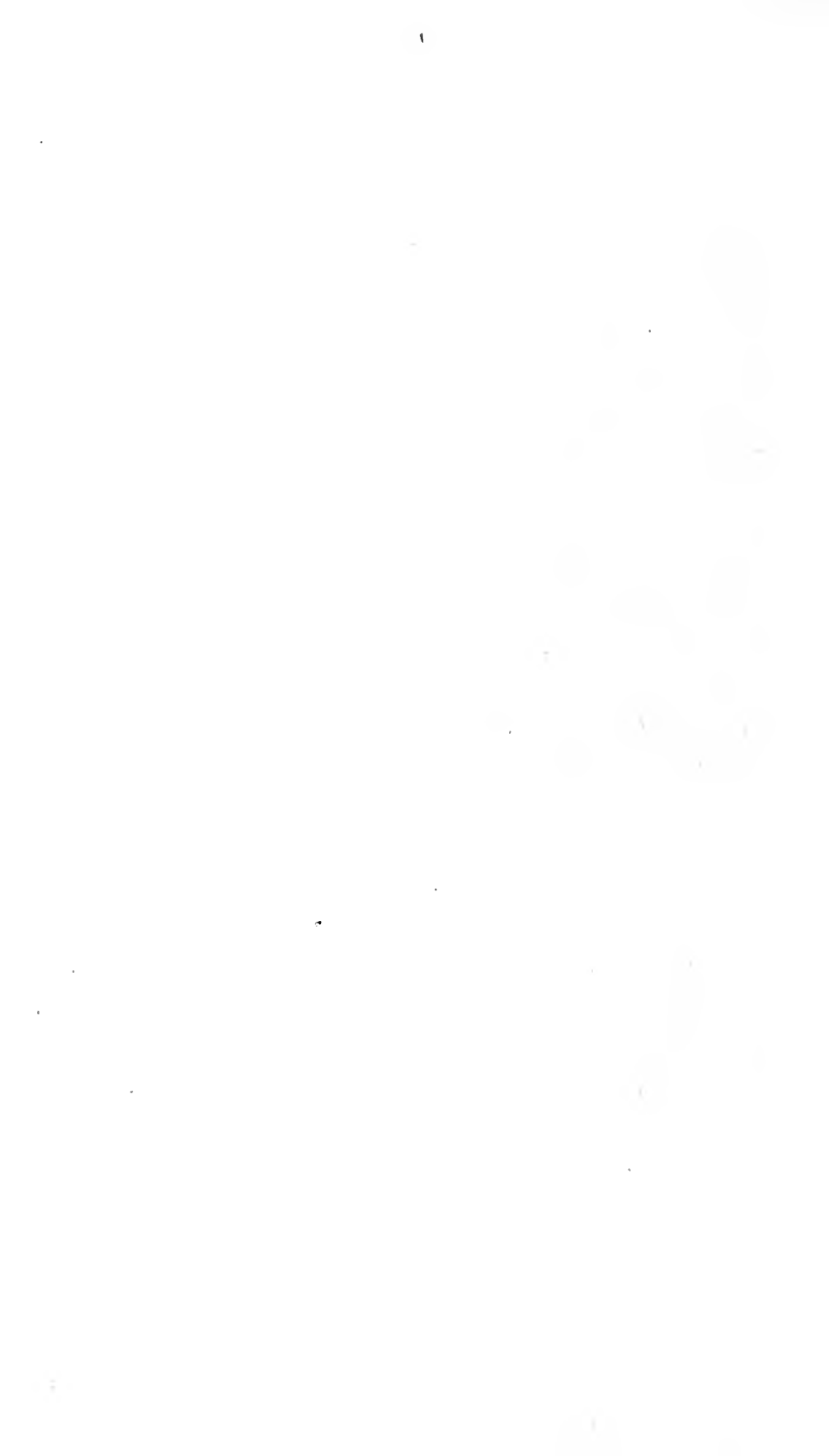
Counsel again addressed the court and said. "Will your Honor allow me -," Again the court interrupted saying, "I don't want any offer made." Counsel then asked if he was to understand that the court had stricken out all the evidence and the court said, "I have,- every bit of it." Exception was duly noted by the defendant, to all the rulings referred to. We are confident that no authority will be found contrary to the repeated holdings of this court to the effect that counsel have the right to make an offer of proof for the two-fold purpose of informing the court what is expected to be proved and of preserving an exception to the exclusion of the offered evidence. Gaffield v. Scott, 33 Ill. App. 317; Cook v. Haussen, 51 Ill. App. 269; Fidelity and Casualty Co. v. Weisse, 80 Ill. App. 499. In Maxwell v. Habel, 92 Ill. App. 516, the refusal of the court to allow counsel to state what he expected to prove by a witness, was held to be error, "because we are unable to tell from anything in the record but that the proposed evidence of the witness was both competent and material, and we are unable to perceive how the trial judge could determine that matter any better than we can."

While the fact that this witness had only been found the night previous to the day on which he testified and had therefore not had an opportunity to refresh his recollection, may not have been a proper ground for a new trial, we deem it proper for this court to examine the affidavits in the record which were filed in support of that motion, from which the facts which counsel was trying to bring out by this witness, appear. From these



affidavits it appears that this witness was engaged to haul several barrels of whisky, upon the occasion about which he testified, from 3065 E. 92nd street to a saloon at the corner of Escanaba avenue and 88th street; that he did that work with a yellow, staked express wagon and two horses; that he loaded the barrels at about eleven o'clock in the morning and shortly thereafter he drove north in Commercial avenue to 88th street where he turned west to Escanaba avenue; that he came across a boy at Commercial avenue and 88th street carrying an umbrella closely over his head, hiding his head from view; that the boy was going across 88th street from the north to the south; that the driver swung his team to the north; and the boy fell south of the team and the wagon passed to the north of where he fell; that the streets were wet and slippery; that the wagon was covered with a tarpaulin and the driver was wearing a cap pulled down over his eyes to protect him from the rain; that the wagon was lettered, "Christ Chudobba, Furniture & Piano Moving," that after passing the corner in question, the witness proceeded about a block, where he met one Dankert, (an employee of the seller of the whisky referred to) who hailed him; that he proceeded to his destination and then returned on foot to the corner in question but the boy had disappeared.

If counsel had been permitted to make this offer as he should have been, we are of the opinion that the evidence referred to should have been held to be competent and its weight should have been left to the jury. It was for the jury to say what effect should be given to the statements of the witness to which the court seems to have taken



exception and whether they discredited the witness or were to be explained (so far as the time of the occurrence was concerned) by the fact that it had happened two years previously and the witness had had no occasion to think of the occurrence since and (so far as the identity of the boy was concerned) by the fact that the boy was covered by an umbrella and the witness's cap prevented a close observation on his part. The record discloses the further fact, which was submitted in support of the motion for a new trial as newly discovered evidence, that after this witness had testified, an investigation of this sale and delivery of whisky had disclosed the invoice and that it was dated "September 7, 1917," which is the date of the accident in question.

The defendant put Pankert on the stand as a witness in corroboration of Wyrobek but the court kept out most of the testimony he tried to give; on the ground that all the testimony of Wyrobek had been stricken out and the witness said he had not witnessed the alleged accident, and because he could not give the exact date of the delivery by Wyrobek, although he said it was on a rainy day and about 11:30 A.M. and that it was "about the 7th of September, * * * because it was right after school started."

Circumstantial evidence is entitled to due consideration just as direct evidence is. Certainly it should not be ruled out as incompetent on the ground that it does not correspond in every detail with the other evidence in the case. The fact that a witness given testimony which does not correspond in every respect with other testimony

or with admitted facts or says he cannot give the exact date of an occurrence, about which he has had no occasion to think or talk for two years, is a mark of the truth of his testimony rather than the contrary.

Complaint is made of certain instructions. It is contended that the court erred in instructing the jury that, "The plaintiff is not bound to prove his case beyond a reasonable doubt but is only bound to prove it by a preponderance of the evidence." That instruction was proper. As to complaint made by the defendant of the court's rulings in modifying an instruction and in refusing certain others, our opinion is that there was no error. The subject-matter of the refused instructions as well as that of the part of the modified instruction, which the court struck out, was sufficiently covered by the instructions which the court gave.

It would be impossible within the limits of this opinion to discuss fully the conduct of the trial court of which defendant complains. Of course, as the plaintiff argues in his brief, every unguarded expression of the court cannot be treated as error requiring a reversal. But a careful examination of the record in this case discloses the fact that the trial court repeatedly broke into the examination of defendant's witnesses and cut counsel off from a proper line of inquiry, often addressing remarks or questions to the witness or counsel which could not have been interpreted by the jury in any other way than as a clear indication that the court was of the opinion that the witness was not to be believed or that the defense which the defendant was endeavoring to establish was not to be credited or even considered seriously. Repeatedly the court took witnesses in



hand and conducted a long cross examination of them himself. At one point he asked questions of one of defendant's employees indicating that he strongly suspected that defendant might have done something to conceal the identity of the wagon which plaintiff claimed was the one which had run over him. The remarks of the court in connection with the testimony of a number of the witnesses was such as to indicate to the jury that the court neither believed the witness nor attached any value or weight to his testimony.

We have already referred to some of these instances. While the yard superintendent was on the stand he testified that the only wagon of the defendant in the yard nearest to the scene of the accident, of the type which was involved here, had not been out of the yard on the day in question until after one o'clock in the afternoon. He was then asked what called that fact to his mind and he answered that it was "the fact that we had inquiries two or three days after this,- some person came over to the office and said that they thought one of our wagons had hurt somebody." Here the court remarked, "Well, what has that got to do with your remembering two or three days before that, at a particular hour it was in your yard?" Most of the following half dozen pages of the record consists of a sharp cross-examination of this witness by the court that indicated that his opinion was that the witness did not know what he was talking about. There were a number of other similar instances. That such remarks must have influenced

the minds of the jury, and that being true, constitute ground for reversal, has been repeatedly pointed out by our Supreme Court. Deshler v. Beers, 32 Ill. 368; Andreas v.

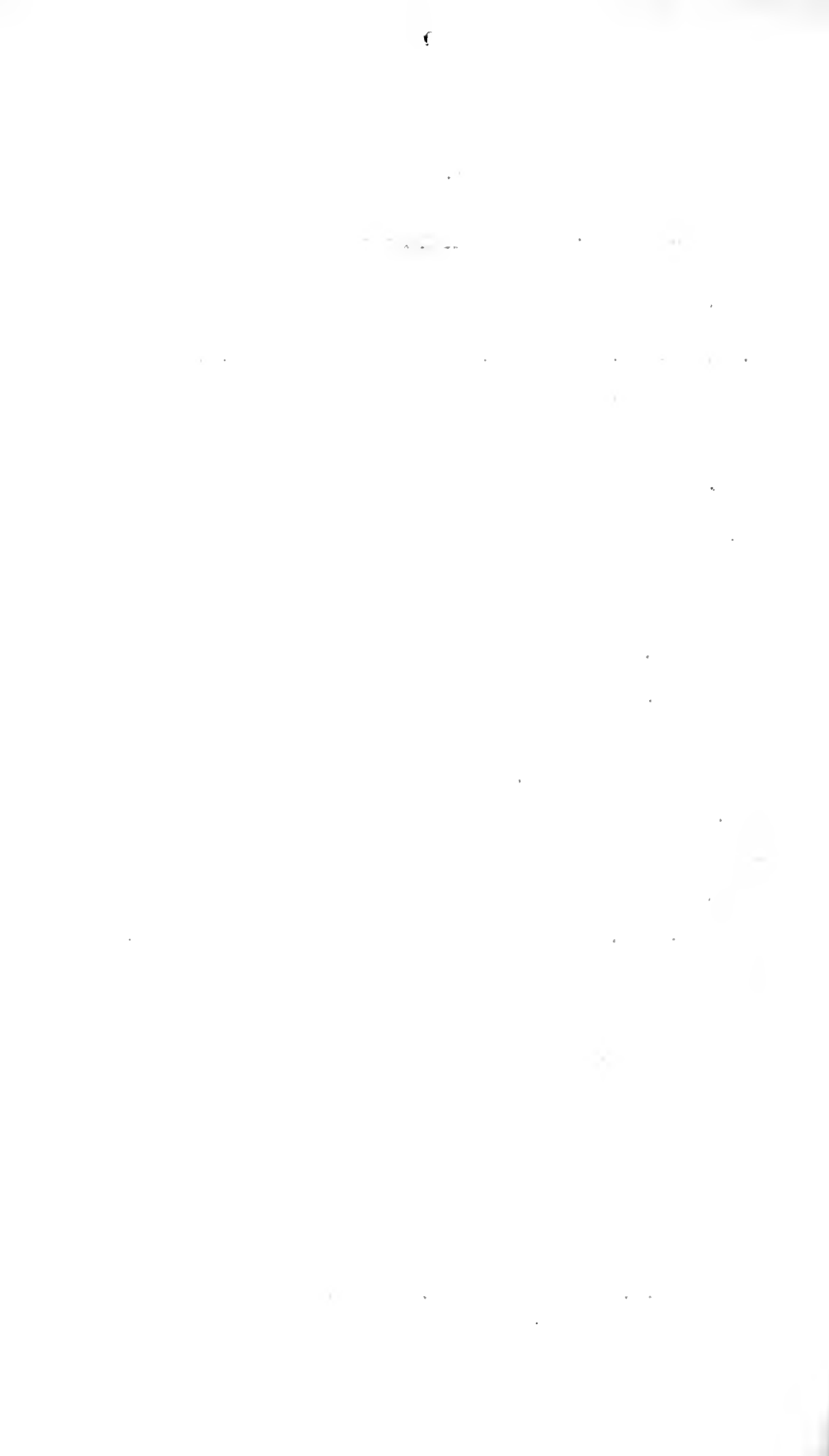
Ketchum, 77 Ill. 377; C. & E. .R.R. v. Holland, 122 Ill. 461. Such is the case even though it may be conceded that there may have been some basis for the court's opinions and remarks. C. C. Ry. Co. v. Enroth, 113 I L. App. 285; C.C. Ry. Co. v. Wall, 93 Ill. App. 411.

Plaintiff makes the point that defendant cannot complain of the conduct of the court because it interposed nonebjection to it. We find the record showing numerous exceptions noted by the defendant to the action of the court. Many of the questions and remarks referred to were put or made in the course of a running fire and cross fire between the court, the witness and counsel. To have put in objections and exceptions to all these questions and remarks and to the conduct of the court, would have placed counsel for defendant, in the eyes of the jury, in an even more embarrassing light than he doubtless was by reason of the court's attitude. As was said by our Supreme Court in O'Shea v. People, 219 Ill. 352, where a similar situation was presented, "the law guarantees the defendant a fair and impartial trial. The course pursued by the presiding judge amounted to a denial of this right."

The judgment of the Superior Court is reversed and the cause is remanded to the Superior Court for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND O'CONNOR, J., CONCUR.



337 - 25216

MENDEL WATZ,

Appellee,

v.

SAMUEL ALPORT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

219 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Watz, brought this action to recover damages occasioned by the failure of the defendant, Alport, to carry out the provisions of a contract in writing under the terms of which Watz agreed to buy 5,000 "Russian Roubles, Currency Pre-war Issue" for \$550.00. The plaintiff paid the defendant \$100.00 on the purchase price when the contract was executed and it was provided that the defendant was to deliver the roubles on June 1, 1918, at which time the plaintiff was to pay the balance of \$450.00. The defendant filed an amended affidavit of merits in which the execution of the contract was admitted. The affidavit further set forth that "at the time the contract was entered into it was the intention of the parties thereto to procure the Russian Roubles mentioned in said contract in the Empire of Japan, and for that purpose it was agreed by the parties that the defendant should * * * journey * * * to the Empire of Japan for the purpose of purchasing the Russian Roubles called for in said contract"; that it was agreed between the parties that the roubles should be purchased in Japan and delivered by the defendant and accepted by the plaintiff under the terms of

the contract, "and none other"; that thereafter the defendant went to Japan and purchased an amount of roubles sufficient to deliver to the plaintiff those mentioned in the contract; that thereafter "on or about June 1, 1918" the defendant returned to this country and applied to the Federal Reserve Board for permission to import the rubles but was advised that an embargo had been placed upon the import of Russian Roubles and that his application to import those he had purchased was for the time being refused. The affidavit further set forth the provisions of the act of Congress entitled "An Act to Define, Regulate and Punish Trading with the Enemy, and for other Purposes" under which said embargo was declared. It also set forth that at the time the contract in question was entered into, the Federal Law did not require a license to import Russian Roubles and alleged that at that time the parties did not have such an event in contemplation and did not know that such a license would be required to import said roubles, but that the embargo was declared subsequently and while the defendant was in Japan.

This affidavit of merits was stricken on motion of the plaintiff and the defendant was defaulted for want of a sufficient affidavit of merits. A jury was then sworn to to assess the plaintiff's damages, which were fixed at \$300 and judgment for the plaintiff was entered for that amount, from which the defendant has perfected this appeal.

In our opinion the affidavit of merits was properly stricken. The defendant could not be permitted to show, in defense of this action, that at the time this contract was executed the parties agreed that it was to apply to Russian Roubles purchased in Japan and no other. It was not set up

in the affidavit that the parties had any additional agreement in writing. The written contract, set forth in the statement of claim, the execution of which was admitted, must be presumed to include all the provisions of the agreement into which these parties entered. Buyers Index Pub. Co. v. Amer. Shoe Polish Co., 169 Ill. App. 618. There is no improbability nor uncertainty about any of the terms of the contract. It had to do with the purchase and sale of Russian Roubles without any mention as to where they were to be procured. The defendant could not be permitted to show that he had an understanding or an oral agreement with the plaintiff that the contract had to do solely with the roubles that he was to purchase in Japan. The contract was in writing and under seal and such an executory contract cannot be altered, changed or modified by any parol agreement. Alschuler v. Schiff, 164 Ill. 298; Yocky v. Marion, 269 Ill. 342.

The defendant complains of certain instructions given to the jury on the question of damages. One instruction told the jury that it was not necessary for the plaintiff to purchase the amount of roubles contracted for, in the open market, on defendant's failure to perform, but that the result was the same as if the plaintiff had bought a like quantity of roubles in the market. That instruction was correct. The other instruction complained of told the jury that the measure of damages was "the difference, if any, between the market price" of the Russian Roubles covered by the contract price and the "contract price at the time the same should have been delivered, and in addition thereto the one hundred dollars paid by the plaintiff to the defendant." That instruction was also correct.

It is further urged that error was committed in the

assessment of damages at \$300. While it is true that it appears from the evidence that the Russian roubles never had what might be called a market value, it is shown that they were subject to purchase and sale in the open market on June 1, 1918 and before and after that date. Presumably the jurors' verdict included the \$100 which the plaintiff had paid the defendant on the purchase price of the roubles covered by the contract, and fixed \$200 as the difference between the contract price and what the jury believed from the evidence it would have cost the plaintiff if he had gone into the market on June 1, 1918 and purchased the 5,000 roubles. That difference of \$200.00 was based on a price of \$15.00 a hundred. A number of witnesses testified on this subject and the prices they gave varied. After reading the testimony, we are of the opinion that the jury was warranted, from such testimony, in concluding that the roubles would have cost the plaintiff \$15.00 a hundred in the open market on the date in question.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



30 - 25257

ARTHUR C. BUCKETT,

Defendant in Error,

v.

EDWARD J. CARTER,

Plaintiff in Error.

WRIT TO

MUNICIPAL COURT

OF CHICAGO.

219 1A 641

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error, the defendant Carter, seeks to reverse a judgment for \$6,000 recovered by the plaintiff in an action of the first class, in the Municipal Court of Chicago, said judgment following the verdict of a jury finding the issues for the plaintiff and assessing his damages at the amount named.

The plaintiff's statement of claim alleged that his claim was for architectural services rendered the defendant, at the special instance and request of the latter, upon oral contracts between the defendant and his duly authorized agent, one Waldman, and the plaintiff; that the defendant agreed to pay the plaintiff for his said services, two and one half per centum of the cost of the building to be erected, as indicated by the contractor's bids in the sum of \$340,000, which was \$8,500; that the plaintiff furnished all the services called for by the contract but that the defendant made no payments to the plaintiff; that after the plaintiff had completed the plans and drawings contracted for by the de

fendant, the latter elected not to proceed with the building according to those plans and requested the plaintiff's services in furnishing new plans for a different building; that, pursuant to such request the plaintiff again rendered professional services as an architect and prepared new plans for a building to cost approximately \$340,000 for which the defendant agreed to pay the plaintiff one-half of one per cent of said amount, or \$1700, which sum the defendant has failed and refused to pay, although all of said services have been rendered, completed and furnished by the plaintiff; that plaintiff's total claim for the services rendered at the defendant's request, amounted to \$10,200.

The affidavit of merits denied the allegations of the statement of claim. As we view this case, it presents only one issue, namely, did the defendant make the contracts for the plaintiff's services and were those services rendered by the plaintiff for the defendant, as the plaintiff alleges, or were they rendered for another? That the plaintiff rendered certain architectural services is not denied.

Many of the facts presented by the record, are not disputed. The defendant, Carter, owned a valuable piece of unimproved real estate, on which there was a mortgage for some \$30,000. He listed it for sale with Oliver & Company, real estate brokers. One Harris of that firm, suggested to Carter that the property be improved and in that connection, he introduced him to a man named Waldman. Carter had no funds but he and Waldman reached an agreement whereby the latter was to finance the erection of a building on the defendant's property. Carter and Waldman executed a preliminary written agreement in which Waldman agreed to "submit sketches, plans

and specifications" for Carter's approval, for which Carter agreed "to pay not in excess of one-half of the usual architect's fees," and it was further expressly provided that "no charge for such plans shall be made", should Waldman fail to finance the deal. About the time this preliminary agreement was entered into by Carter and Waldman, or shortly thereafter, the plaintiff Buckett was introduced to Carter by Waldman in the latter's office. Between this time and the middle of April, the parties had a number of conferences, over which there is dispute. It is not denied, however, that on April 18, 1916, Carter and Waldman entered into a final and more formal contract covering the erection of a building on Carter's property. This contract provided, among other things, that "final plans and specifications shall be furnished by said contractor (Waldman) prepared by said Arthur G. Buckett * * * and all architect's fees in connection with said plans and specifications and the erection of said buildings shall be three per cent (3%) of the cost of the material and labor for said buildings, to be paid on second mortgage notes hereinafter mentioned. * * * The said contractor shall receive as compensation (in addition to cost of labor and material) ten per cent (10%) of the costs thereof, and said ten per cent (10%), together with the three per cent (3%) for architect's fees, shall be paid to said contractor by said owner, by the delivery to said contractor by said owner of the second mortgage notes hereinafter mentioned." It was further expressly provided in this agreement that if it transpired that the cost of the labor and materials for the building as called for by the final plans, exceeded \$300,000, either party could withdraw and terminate the

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agreement on giving a stipulated notice.

It is further shown by the evidence and not disputed, that Buckett held back on the plans until the contract between Carter and Waldman had been executed and then he went ahead. He prepared plans, on which certain bids were taken and it transpired that the building was going to cost over \$50,000 beyond the amount Waldman had been able to arrange for, to finance the deal, and Waldman gave up his efforts and in July his contract with Carter was formally cancelled.

Harris then brought a new man into the deal, one Gottschalk, who finally financed the erection of the building that was put up on the defendant's property. Buckett made an effort to have Gottschalk engage him as the architect on this building but he declined, finally proposing to have Buckett associated with his architect on a weekly salary, which Buckett refused. Gottschalk engaged his own architects, who prepared all the plans and specifications for the building as erected at a cost of about \$700,000. After Buckett was out of the deal he saw Carter, and, at his request, Carter showed him a copy of the Waldman-Carter contract. Buckett asked for a copy of it, saying he was going to get after Waldman. He did not ask Carter for any money, or claim that Carter had hired him or was indebted to him in any way, but about a month later he wrote Carter requesting payment of \$10,200 for the services he had rendered.

The facts thus far referred to are not disputed in the record. Harris and Gottschalk testified to conversations they had with the plaintiff, Buckett, and although he took the stand in rebuttal he did not deny them. Harris testi-

Figure 1

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[illegible]

fied that Buckett had told him that he had been employed on this job by Waldman; that after Waldman failed to finance it, Harris took Buckett over to see Gottschalk and tried to induce the latter to employ him, (telling Gottschalk, in Buckett's presence, that Buckett was the architect who had been employed by Waldman); that Buckett had consented to go to see Gottschalk, with Harris, only upon being released by Waldman; that Buckett stated in conversation with Gottschalk, that Waldman had employed him; that at another time Buckett said he could not afford to spend any more money on this job than was necessary as he was taking a chance on it,- that if Waldman would advance him some money on it he could make more rapid progress; that Waldman said, in the presence of Buckett, that he did not intend to spend any more money than necessary because, under his agreement with Carter, the latter would be held harmless unless he (Waldman) could raise a sufficient loan; that Buckett said he would do the work in the evenings inasmuch as it was a game of chance whether they got the contract or not; that Buckett told him (Harris) that he expected Waldman to pay him for the work he had done; that on another occasion, Buckett told him that Waldman wanted him to take his commissions in the form of a second mortgage.

Gottschalk testified that in his initial talk with Harris and the plaintiff Buckett, he asked Buckett what his relation was with Carter and that Buckett replied that he had a contract with Waldman which provided that he was to be the architect for the building if Waldman could finance it,- that he had no contract whatever with Carter.



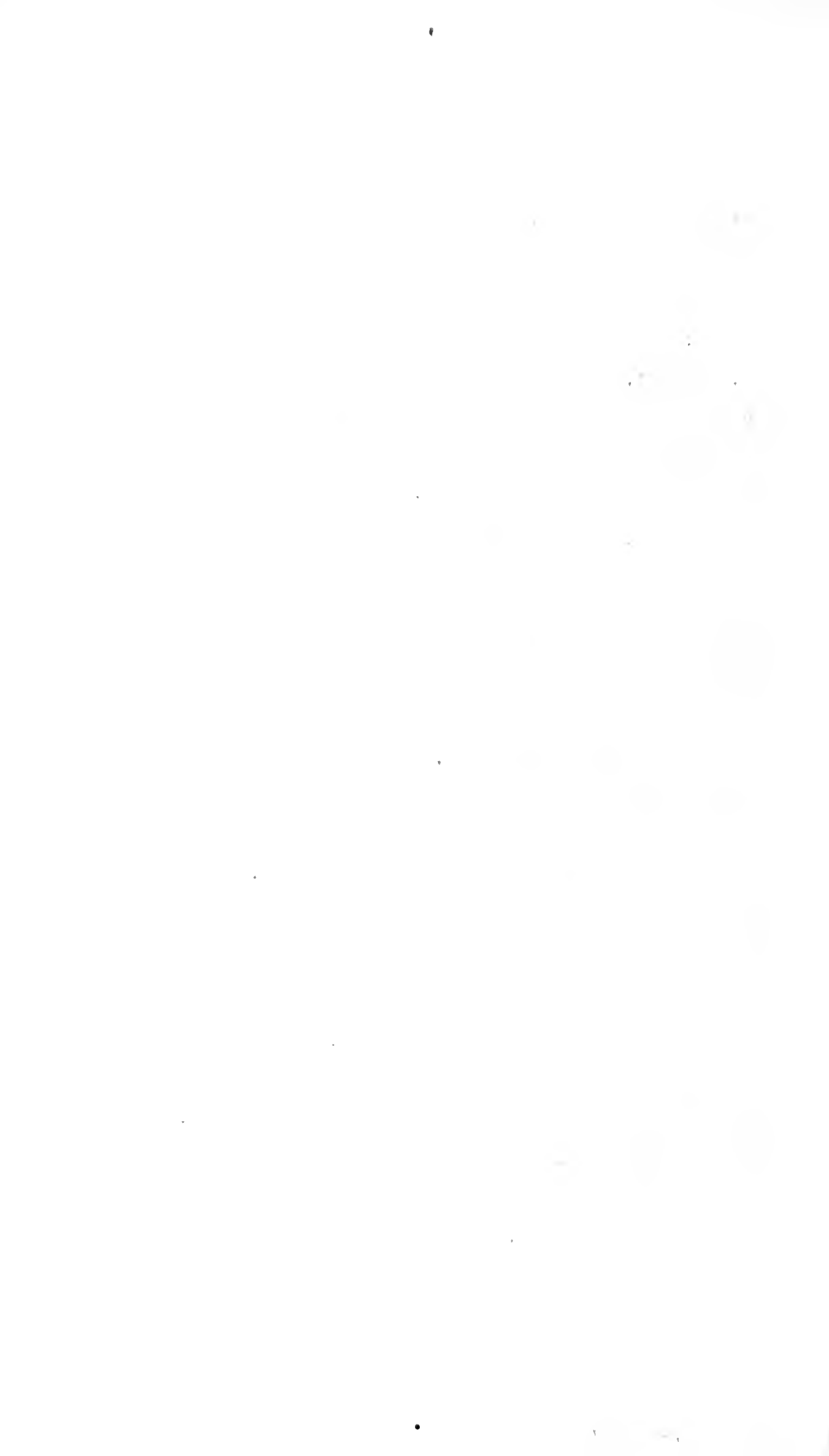
While the plaintiff did not deny this testimony in rebuttal, he did give some testimony in putting in his main case, which in part at least contradicted these witnesses for the defendant. For instance, he testified that when he went with Harris to see Gottschalk, he insisted upon going only as representing Carter. He further testified that he told Gottschalk that Carter had hired him as his architect.

There was a sharp conflict in the testimony of the plaintiff who claimed the hiring, on the one hand, and the defendant, who denied it, on the other. Buckett testified that in his first talk with Carter, when he was introduced to him by Waldman in the latter's office, he told Carter that he understood that arrangements had been made to take care of the financing of the building and that "this is to be a two and one-half per cent architectural job", and that Carter replied, "Yes, that is right"; that on another occasion Carter told him that if the cost ran higher, he could stand it; that Buckett said he understood Carter had property which might be turned into this deal, and Carter replied, "Yes"; that he told Carter that the matter of notes, to which Waldman had referred (the second mortgage notes that Waldman wanted Buckett to take) must be very definitely understood, for he had heavy carrying charges,- that he could afford to take \$5,000 in notes if he got the balance in cash, "which I told Mr. Waldman", and that Carter replied, "Very well, that sounds like a fair proposition"; that on another occasion he told Carter he was going to considerable expense in this work and that it would cost a good deal to put the



work in final shape, "and I want your assurance in the matter before I proceed," and that Carter replied, "You have my assurance and I will see that you are treated right"; that at the time Gottschalk came into the deal he, Buckett, told Carter that he wanted a very definite understanding as to their relations,- that he wanted to know just what his relation to Gottschalk would be and what his remuneration would be in the new deal, and that Carter said, "I will give you an additional one-half per cent over your figure in the previous deal if you will handle this new deal through the drawing of plans and specifications and the taking of figures." and that he told Carter he would accept that offer.

On the other hand, Carter testified that in one of their first talks he told Buckett that his arrangement with Waldman was that the architect's commission was to be half the usual amount; that he wanted it understood that he had no money to go into such a proposition and that Waldman had undertaken to finance the building and furnish all the money necessary for every purpose in connection with it; that he asked Buckett if he felt he (Carter) could be protected, with an architect working with the contractor "instead of employed by me," that Buckett said that it was coming to be the customary way; that he talked with Buckett about the terms of the contract he had made with Waldman; that on one occasion when Waldman, Buckett and the witness were together, there was some talk about Buckett's compensation and that Buckett said to Waldman, "You don't expect me to take all my money in paper do you?" and that Waldman passed it off and said something to the effect that they would not talk about it then,- "We will fix that up"; that it was during his second

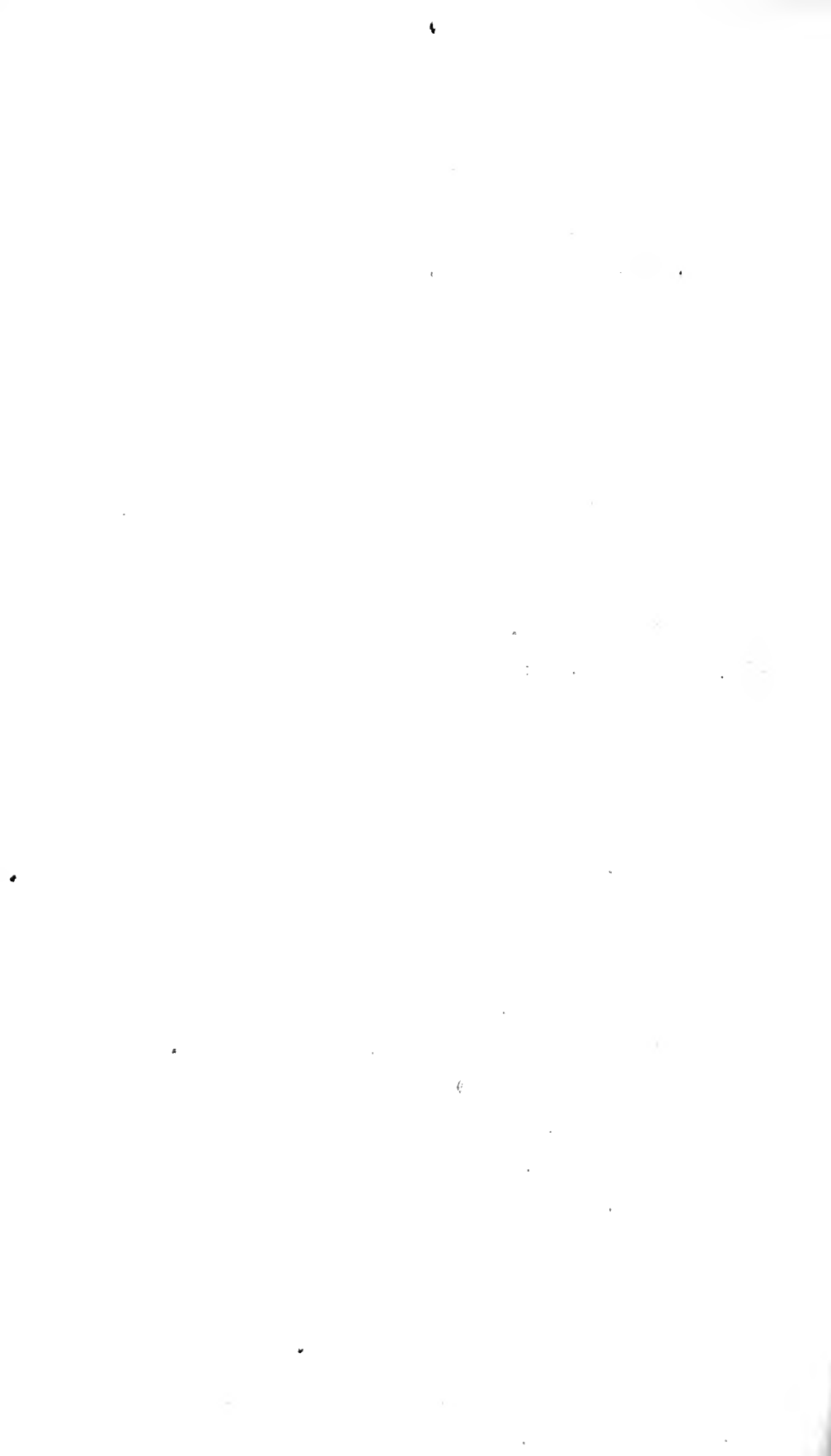


talk with Buckett that "I told him my arrangement with Mr. Waldman was that he was to furnish me the architectural service at one-half the usual fee * * * that Mr. Waldman's contract with me was to provide the funds for financing the deal and that in the event that he could not do so I was to be put to no expense in connection with it"; that Buckett was present when the witness complained about the delay and Waldman said, "if you are not satisfied with what we are able to do and I am not able to finance the deal, we will hand you your contract back"; that on one occasion Buckett told him Waldman was blaming him (Buckett) because the figures were running so high and that he felt a bit restless and that he did not want to be dumped in this matter,- if this deal is going through, I want to know that I am going to get a square deal," and that he (Carter) assured Buckett he would not consent to anything else,- that he did not see how Buckett could be "dumped" as he was the architect named in the contract he (Carter) had with Waldman, and "as far as I am concerned I would see that you get a square deal but I think Mr. Waldman has no such intention as that"; that Buckett said what he wanted was Carter's assurance that he would see that he (Buckett) got a square deal. He testified further that when the figures ran up over \$50,000 above the amount Waldman was able to arrange for in his efforts to finance the deal, he (Carter) offered to raise \$15,000 on the equity he had in another piece of property, if that would do any good. He testified that when Harris proposed bringing Gottschalk into the deal, and taking Buckett over to see him with the plans, Buckett first objected, saying that he could not do that without Waldman's consent and that Waldman said he would be willing to have Buckett take the plans to Gottschalk;



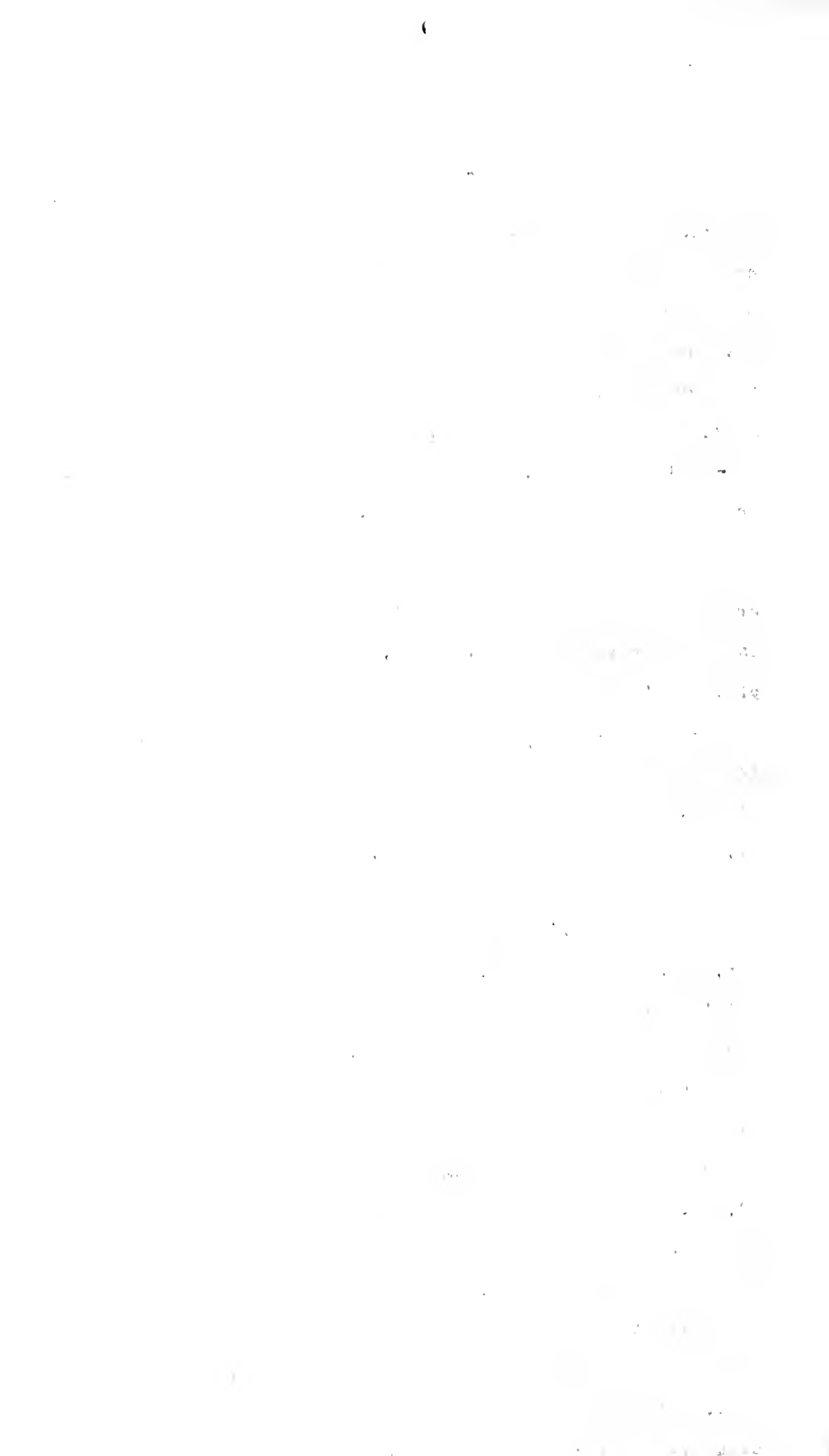
that later Buckett told him, "if this old deal has fallen through, why, I am going out, after this job if Mr. Gottschalk is going to get it;" that he (Carter) offered to talk with Gottschalk in Buckett's interest and try to get him to retain Buckett as the architect and that he did talk with Gottschalk and told Buckett about it. He testified about Buckett asking to see a copy of his contract with Waldman after Waldman had dropped out of the deal, Buckett saying he intended to "see" Waldman or "go after him"; that Buckett said that while he knew the general terms of the contract, he had not been familiar with some of the details of it; that he (Carter) had not closed his deal with Gottschalk at the time Buckett broke with the latter and that he told that to Buckett at the time. Carter specifically denied each of the conversations Buckett claimed to have had with him concerning his compensation as testified to by Buckett.

On this record we are of the opinion that the verdict for the plaintiff is not supported by the manifest weight of the evidence. The testimony of the plaintiff is entirely without corroboration, either by the testimony of other witnesses or by any facts and circumstances involved in the case, while that of the defendant is clearly corroborated by both. It is of course true, as the plaintiff contends, that Buckett could not be bound by the contracts entered into by Carter and Waldman and those contracts were not admissible as binding Buckett but they were admissible as tending to corroborate the testimony of Carter to the effect that he entered into no contract or agreement with Buckett as the latter claimed. It is evident that Carter, having made a contract with Waldman, whereby the latter was to finance the



erection of a building on Carter's property and whereby he was further to furnish the architectural services and be allowed 3% on the cost of the building, therefor, would have no occasion to contract for such services himself with the very architect whose services Waldman had in his agreement, contracted to provide. That Buckett knew of the Waldman-Carter contract, and in a general way what it provided, we do not doubt from the evidence.

We are further of the opinion that the trial court erred in denying the defendant's motions to instruct the jury to find the issues in his favor, made at the close of the plaintiff's case and at the close of all the evidence. That the plaintiff, in his statement of claim, alleges express contracts with the defendant whereby the latter promised to pay him \$8,500 for his services under the first contract, and \$1,700 under the second contract, and further alleges that the defendant had failed to pay him that compensation although he had fully performed all the services contracted for, admits of no doubt. It is equally clear that the plaintiff's evidence failed to make out a prima facie case in support of that statement of claim. We have referred to all conversations testified to by the plaintiff in support of his claim that Carter had expressly promised to pay him 2½% on the cost of the building as originally contemplated, or \$8,500. It will not be necessary to repeat them here. In our opinion these conversations do not make out a contract as the plaintiff claims. Nothing that the plaintiff himself testifies that the defendant said, can be held to amount to the express contract on which the plaintiff has brought this suit. The words which the plaintiff claims the defendant used are similar to those involved in Breitenstein v.



Independent Button and Machine Co., 192 Ill. App. 399, at pages 402-403, where this court held that the language used did not make out a contract. There is a large amount of evidence in the record involving the submission of various plans and sketches to Carter and his criticism of them and changes made in them at his suggestion, none of which can have any tendency to support plaintiff's allegations that express contracts were entered into. Even if the evidence tended to make out an implied contract, which we doubt, it could not support this verdict and judgment, for having declared on an express contract, the plaintiff could not recover on the theory of an implied contract.

As to the second contract into which plaintiff declares the defendant entered with him, the plaintiff's evidence does make out a prima facie case to the effect that the contract was made, but that evidence not only fails to show that the plaintiff fulfilled his part of the contract and rendered the services contracted for but it affirmatively shows that the contrary is the case. Plaintiff's evidence as to this contract is that defendant agreed that he would pay the plaintiff the additional amount stipulated, "if you will handle this new deal through the drawing of plans and specifications and the taking of figures." Plaintiff makes no pretense of having done that for he himself testified that upon his failure to obtain a satisfactory arrangement with Gottschalk, he got out of the deal and then went to see Carter and told him he was "through entirely" and advised him to do "practically what I have done,- get out."

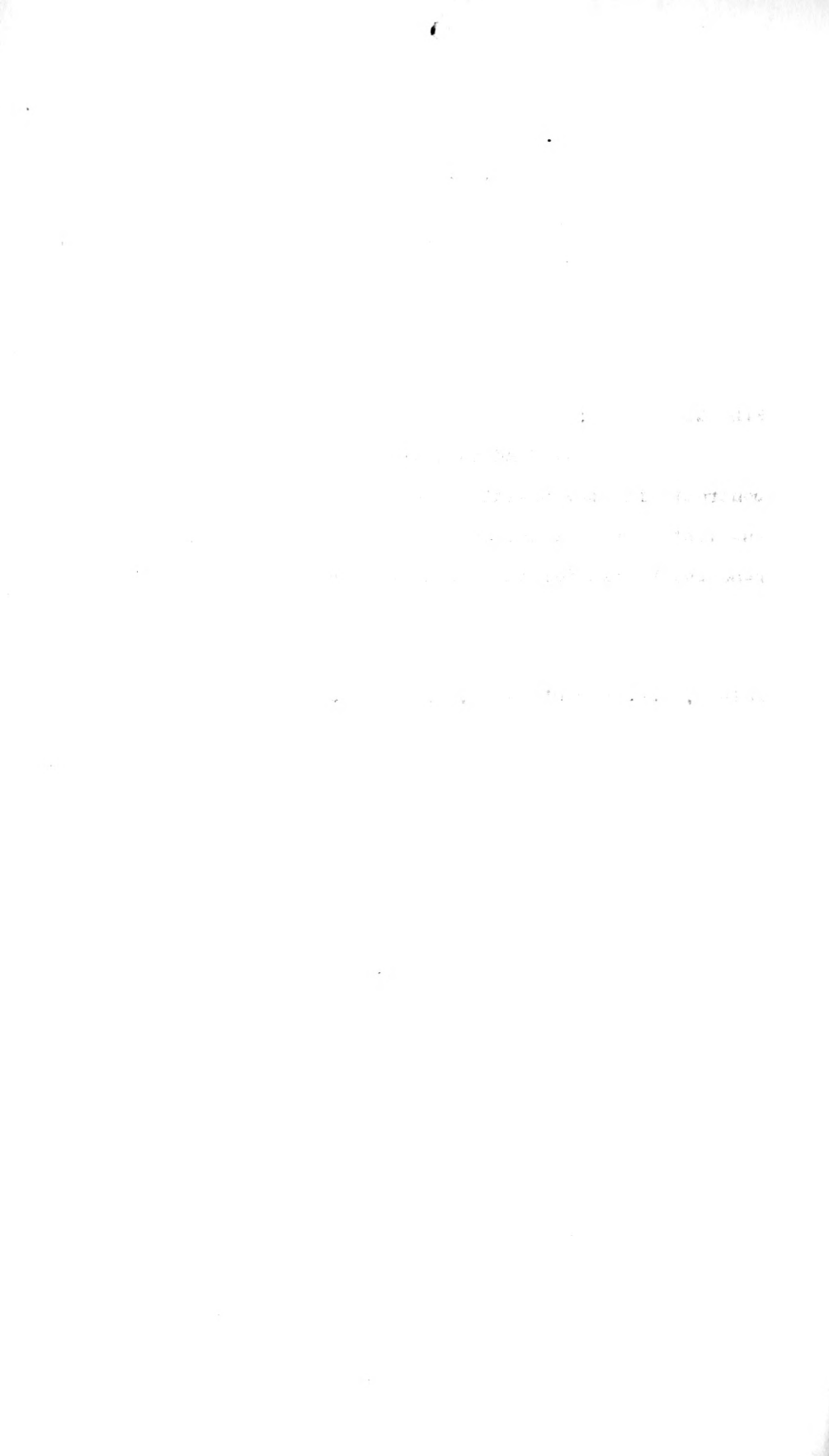
For the reasons stated, the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant did not contract with the plaintiff for his services as alleged and that such services as the plaintiff rendered, were not rendered by him for the defendant, but for another.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



42 - 25279

THE PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error.)

v.)

JOHN RUSSELL,)

Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

219 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant seeks to reverse the judgment of the Municipal Court of Chicago, finding him and guilty of living with a woman in an open/notorious state of adultery and sentencing him to the House of Correction for sixty days.

It is urged by defendant that the finding of the court is against the manifest weight of the evidence and also that the court erred in admitting certain conversations in evidence although they took place in his absence.

As to the first point, we cannot say that the finding of the court is against the manifest weight of the conflicting evidence as it is contained in the record, but further, the record fails to show that it contains all the evidence heard by the court and in the absence of such showing we must assume that the court heard sufficient evidence to warrant the finding made. People v. Adams, 289 Ill. 339.

As to the second point although the record shows that the defendant made objection to the admission of the

evidence referred to it does not disclose any ruling made by the court and furthermore the record states that by agreement the case at bar was tried together with another case of the same nature in which the woman involved in this charge was the defendant, and the conversations referred to were had in her presence and were admissible as to her. The cases were tried by the court, without a jury and we must presume that as to this defendant, the court considered only such evidence as was competent as to him.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



107 - 25360

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel, Michelangelo Facella,

Appellant,

v.

BENNETT COLLEGE OF ECLECTIC MEDICINE
AND SURGERY, a corporation, and FRAN-
CIS W. SHEPARDSON, Director of Regis-
tration and Education of the State of
Illinois,

Appellee.

APPEAL FROM

SUPREME COURT,

COOK COUNTY.

2191A 641

MR. JUSTICE THOMSON delivered the opinion of the
court.

Appellant filed his petition for mandamus, as he
states it in his brief, filed by appellant pro se, "directed,
firstly, to the Harvard Medical College Corporation, commanding
it forthwith to issue or cause to be issued from its Medical
College, the 'Jenner Medical College,' a certificate of cred-
its for the freshman and sophomore years, duly executed by
the officers of said corporation, attested by its corporate
seal, as is the custom of its college in issuing certificate
of full credits, if the Bennett College of Eclectic Medicine
and Surgery, after accepting appellants' foreign credits as
equivalent to the B.S. degree, submitting him to an examina-
tion in all the subjects embraced in the freshman, sophomore
and junior years, matriculating him as a senior and conferr-
ing upon him the degree and title of Doctor of Medicine, is
entitled to receive and obtain first the said certificates of
credit for the freshman and sophomore years from the Jenner
Medical College, before delivering unto the appellant a dip-

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loma or certificate of graduation; secondly, directed to the Bennett College of Eclectic Medicine and Surgery, commanding it forthwith to issue and deliver unto appellant his diploma or certificate of graduation, duly executed by the officers of said corporation, attested by its corporate seal, as is the custom of said college in issuing diplomas or certificates of graduation; thirdly, directed to Francis W. Shepardson, Director of the Department of Registration and Education, if the recipient of a diploma from the Bennett College of Eclectic Medicine and Surgery would entitle him to practice medicine and surgery in the State of Illinois, commanding him forthwith to issue and deliver to appellant, after paying the required fee, a license for the practice of medicine and surgery in the State of Illinois; and if the recipient of a diploma from the Bennett College of Eclectic Medicine and Surgery does not entitle him to practice medicine and surgery in the State of Illinois without first taking and passing an examination, commanding him forthwith to admit appellant to participate in the examination without prejudice; and that such further order may be entered in the premises as justice may require."

The appellees filed demurrers to the petition which were sustained. Appellant elected to stand on his petition and prayed an appeal.

An examination of the petition shows it to be a conglomeration of pleading and evidence, statements of fact and conclusions, ninety-four typewritten pages in length. It wholly fails to set forth any proper grounds for the issuing of the writ prayed for. Although the case at bar involves other defendants and issues, it is conclusively determined by what this court said in People ex rel Michelangelo Pacella v. Bennett Medicine College, 205 Ill. App. 324. As was there said,

"Colleges and universities must be the judges of qualifications of medical students. A medical school must be the judge of the qualifications of its students to be granted the degree of doctor of medicine." The same thing is true as to the qualification of students in a given school to be granted certain credits. For the courts to direct by writ of mandamus that a medical school shall give either certain specified credits or a diploma to a petitioning student who has failed to meet the required grades in certain of his subjects, according to the judgment of the school, would be preposterous. Such is the situation as disclosed on the face of this petition.

The demurrers were properly sustained and therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

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489 - 25750

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel Jeanette Fritz,

Appellee,

v.

CHARLES DAY,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2191A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal, the defendant seeks to reverse the judgment of the Municipal Court of Chicago, by which he was found to be the father of the bastard child of the relatrix, Jeanette Fritz, following the verdict of a jury, and was adjudged to pay the clerk of said court \$550 in instalments, for the support, maintenance and education of said child. He contends the verdict is against the manifest weight of the evidence and also that the Municipal Court was without jurisdiction.

We have carefully examined the evidence as we find it in the record. It is, of course, contradictory. The sister of the relatrix and a policeman of Blue Island, Illinois, where the parties resided at the time of the relations involved, testified for the defendant. The testimony of the latter witness was entirely unimportant. It is apparent that the relatrix and her sister were not on good terms. Her testimony might be wholly true, however, and yet the defend-

ant be guilty, as the jury found.

We do not find the story of the prosecutrix "so out of accord with all reasonable probability that it stamps itself as beyond belief," as counsel for the defendant contends. Quite the contrary. Certain facts, admitted or mentioned in the testimony of the defendant and of the sister of the relatrix, tend to corroborate her. It would serve no purpose to analyze the evidence. That it supports the verdict is clear. If the jury believed the relatrix and did not believe the defendant, as well they might, the verdict is the only one that could have been returned.

The question of the jurisdiction of the Municipal Court is one which the defendant is not in a position to raise now. It is the jurisdiction of his person that he calls in question, contending that he was not found within the City of Chicago but was arrested at Blue Island and later brought to Chicago. But the defendant went to trial on the merits without raising any question as to the court's jurisdiction and did not do so until some time after the trial was over. Proceeding to trial on the merits waives objection to jurisdiction of the person. Adamski v. Wieczorek, 93 Ill. App. 357.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



458 - 25719.

LOGAN L. MULLINS, receiver of
ENGLEWOOD SASH & DOOR COMPANY,
a corporation,

Appellee,

vs.

THE LEHIGH VALLEY COAL COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 I.A. 642

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

On this day the appellee comes into court by his solicitor, and appellant comes likewise by its solicitors, and file herein their stipulation that the appellee confesses the errors assigned upon the record, both parties consenting that for such errors the decree of the Circuit Court be reversed and the cause remanded to that court with directions to the Circuit Court to dismiss the bill of complaint without cost to either party and that each party pay his own costs in this court.

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ERRORS CONFESSED, DECREE REVERSED AND
CAUSE REMANDED WITH DIRECTIONS TO THE
CIRCUIT COURT TO DISMISS THE BILL FOR
WANT OF EQUITY WITHOUT COST TO EITHER
PARTY.

GEORGE HOLY,
Plaintiff in Error,
vs.
A. C. McCLURG & COMPANY,
a corporation,
Defendant in Error.

APPEAL TO CIRCUIT COURT OF
COOK COUNTY.

219 I.A. 642

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

In this action for malicious prosecution a verdict was directed for defendant and a judgment of nil capiat entered thereon, from which plaintiff prosecutes this appeal in an attempt to reverse the judgment.

The principal contentions for reversal are that the record of the criminal proceedings upon which the action of this prosecution is founded is admissible only for the purpose of showing the commencement and termination of the criminal proceedings and for no other purpose; that the question of probable cause was one of fact for the jury; and in arguendo that a verdict for defendant could not be instructed; lastly, that the verdict finding defendant guilty of a criminal action is not conclusive on the question of probable cause.

The facts in brief are that September 28, 1914, a burglary occurred in the wholesale store of defendant in Chicago, in which two safes were blown open and a number of fountain pens, briar pipes, opera glasses, and other things were taken by the burglars. The watchman of defendant was bound by the two marauders who committed the burglary, and from a description furnished by this watchman to certain detectives some of the goods were traced to the Star Hub Loan Bank, a pawnshop in Chicago. These goods were identified by one Scott, an employee of defendant, as being

the goods of defendant. The pawnbroker upon being questioned as to where he obtained the goods named plaintiff. Detectives visited the store of plaintiff and there found other goods belonging to defendant. Plaintiff being asked where he got the goods said that his father had purchased them for him, but at the trial testified that he had said that he bought the goods at auction sales. The father denied that he had purchased the goods for plaintiff, but said that plaintiff had at some previous time brought them in a trunk to his residence. Plaintiff subsequently admitted that his statement that his father bought the goods was not correct, but that he had in fact bought the goods from a man named Cippera at 1644 Throop street two weeks previous. Thereupon the police sergeant went to the Throop street address and learned that Cippera had left for Europe three years before and that the store was a grocery store. October 12, 1914, Scott consulted a member of defendant's law firm and stated to him all the material facts regarding the property found in plaintiff's possession after the burglary and also informed the lawyer that the detective sergeant had requested him to sign a complaint, and wished to know what he should do about it. Scott was advised by the lawyer that he had probable cause for arresting plaintiff and thereupon went to the East Chicago avenue police station with Scott, where they had a conversation concerning the burglary with detectives and with an assistant state's attorney and two police sergeants. Scott repeated the facts of the case to the assistant state's attorney and the same were related to a judge of the Municipal court, and thereupon Scott signed the complaint under which plaintiff was arrested and held to bail in the sum of \$1,000. October 23, 1914, defendant waived the hearing and the case was continued until November 11, 1914, on which date plaintiff was held to the Criminal court of Cook County in bail of \$2500. The grand jury returned an

indictment against plaintiff to the December term, 1914, upon which indictment he was arraigned and pleaded not guilty. On February 10, 1914, upon a trial plaintiff was by the jury found guilty of receiving stolen goods, etc. A motion for a new trial was continued from time to time until October 8, 1917, when the motion was granted and a new trial ordered, and on December 13, 1917, on motion of the state's attorney the indictment was dismissed.

(We might here paranthetically remark that the fact that the motion for a new trial was delayed for three years and eight months is somewhat baffling and not to be accounted for under ordinary rules of procedure.)

In the first place, Scott swore that he did not act for or at the request or with the knowledge of defendant in swearing out the warrant for plaintiff's arrest. This evidence is not contradicted, and it is therefore conclusive against plaintiff that the prosecution was not instituted by or with the authority of defendant, but that Scott alone was the prosecutor.

The evidence demonstrates amply that the prosecution was founded upon probable cause, whoever may have instituted it. We think there are eight instances showing the existence of probable cause, as follows:

1. The advice of competent counsel based on a disclosure of all the pertinent known facts.
2. The endorsement of the Municipal court Judge on the back of the complaint finding probable cause for filing it.
3. Order of the Municipal court Judge of October 13, 1914, that there was probable cause and holding plaintiff to bail.
4. Order of the Municipal court Judge October 23, 1914, reciting that there was probable cause.

5. Order of November 11th of the Municipal court holding plaintiff to the grand jury.

6. Indictment of plaintiff by the grand jury at the December term 1914, based on the testimony of six witnesses.

7. Overruling of motion of plaintiff to instruct the jury to return a verdict of not guilty on the trial in the Criminal court.

8. The verdict of the jury finding plaintiff guilty.

None of the foregoing has been rebutted by any claim or contention that any of the orders or actions there recited was brought about by fraud, perjury or unfairness. In Dahlberg v. Grace, 178 Ill. App. 97, it was held that a conviction in criminal cases is conclusive proof of probable cause for instituting the prosecution unless such conviction is proven to have been brought about by false or fraudulent testimony or other unlawful means, and that the record of such conviction is admissible in evidence on the question of probable cause, notwithstanding the fact that the conviction may have been set aside by a court of review, or, as in the instant case, a new trial granted followed by a subsequent discontinuance of the prosecution.

The record in a criminal proceeding on which an action for malicious prosecution is founded is admissible for the purpose of showing the existence of probable cause. While the question of probable cause has been held by this court to be one of fact for the jury's determination, yet when the evidence indisputably shows the existence of probable cause such question of fact is resolved into one of law and, as in other cases where a like condition in the evidence prevails, it is the duty of the trial judge to grant a motion instructing a verdict for the defendant. In Tuebbecke v. Rothschild's, 152 Ill. App. 321, in

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reversing a judgment entered upon the verdict of a jury, the court held that it was inconceivable why the trial judge should, under the circumstances recited, have refrained from directing a verdict. Young v. Lindstrom, 115 *ibid* 239, in which the court said: "While it is for the jury to determine the facts in any given case, what constitutes probable cause is a question of law." In Glenn v. Lawrence, 280 Ill. 581, being an action for malicious prosecution, an instructed verdict for defendant was sustained as being without error.

It would have been proper for the court to have allowed the motion to instruct a verdict for defendant when plaintiff rested his case, as he had given in evidence the complaint of Scott with an order for process by a municipal court judge thereon and the indictment of defendant by the grand jury for the crime charged in the complaint to have been committed; which were cogent evidences of probable cause. Where probable cause is proven the question of malice is eliminated as a factor in the cause.

As there is no reversible error in this record, the judgment of the Circuit court is affirmed.

AFFIRMED.

Dever and McCurely, JJ., concur.

105 - 25876.

DOLESE & SHEPARD COMPANY,

Appellant,

vs.

NATIONAL STONE COMPANY, a
corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2191A 342

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

In a jury trial defendant had a verdict and judgment on its counter-claim for \$549.65, and plaintiff appeals.

The dispute between the parties relates to an item of \$1062.98 claimed by defendant. The judgment is the difference between that item and the amount of plaintiff's claim. Plaintiff contends that the whole matter rests in an account stated between the parties, in which the amount of plaintiff's claim was stated in plaintiff's statement rendered defendant as the amount due plaintiff, that such statement retained by defendant without objection worked an accord and satisfaction, and that the court committed error in allowing a witness to refresh his recollection from a memorandum which had not been prepared by him.

The latter objection we think is without merit, as the witness did not testify from the memorandum shown him, which memorandum simply served the purpose of refreshing the witness's recollection regarding the matter about which he testified. Such method of refreshing a witness's recollection is recognized as lawful. Soovill Mfg. Co. v. Cassidy, 275 Ill. 462; Brauer v. Laughlin, 211 Ill. App. 534. The rule is stated in the Cassidy

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case to be that "A witness can testify only to such facts as are within his knowledge and recollection, but he is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book, and it is not necessary that the writing should have been made by the witness himself or that it should have been an original writing, provided that after inspecting the record he can speak to the facts from his own recollection. Neither is it necessary that the writing thus used should itself be admissible in evidence." The objection made on this point therefore falls.

Plaintiff and defendant were both dealers in stone. The account of plaintiff in suit was for stone sold by plaintiff to defendant with credit items for cash and freight and for certain other allowances. Defendant's claim of set-off is for stone sold by it to plaintiff and delivered more or less to third parties on the order of plaintiff, less credit for cash, freight, cash allowances and credit accounts for stone bought by plaintiff of defendant.

We think the jury might reasonably find from the evidence that the statements rendered by plaintiff to defendant did not cover or pretend to cover or contain the items of stone bought by it from defendant or for stone shipped by defendant to third parties on plaintiff's order. Furthermore, they might further find from the evidence that plaintiff's books did not contain credits for all the stone purchased from defendant and that the statements rendered did not contemplate such transactions in their entirety, nor that plaintiff intended, in the rendering of said statements, to have them work an accord and

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satisfaction between itself and the defendant.

The fact that defendant did not demur to or challenge the correctness of such statements the jury might readily conclude arose from the fact that so far as the items themselves were concerned they were in the main correct. This, however, would not preclude defendant from rendering a statement to plaintiff and collecting for stone which it had furnished plaintiff or delivered to third parties upon its order. These accounts between the parties covered quite a long period of time. Defendant's account started April 30, 1914, with its last credit item May 29, 1916, and its last debit item the last of November, 1915, while plaintiff's account commenced August 30, 1915, and concluded February 18, 1916.

An examination of the instructions touching the doctrine of accord and satisfaction discloses no material error from which we can say that the jury was misled as to the application of the doctrine of accord and satisfaction to the facts in evidence. An accord and satisfaction contemplates a bona fide dispute between the parties. Obermeyer v. Farms Co., 199 Ill. App. 568. No such dispute appears from the evidence in this record. Furthermore, there must have been a tender to constitute an accord and satisfaction and an acceptance with the understanding that the amount accepted is in full payment of all accounts between the parties.

All the evidence considered and the law applicable thereto, the verdict and judgment seems to do justice between the parties. No such error appears in procedure as would warrant this court in reversing the judgment and ordering a

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new trial where the merits of the case are so manifestly
on the side of defendant.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

114 - 25885.

HENRY H. BISHOP,
Plaintiff in Error,

vs.

AETNA LIFE INSURANCE CO.,
Defendant in Error.

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) ERROR TO CIRCUIT COURT
) OF COOK COUNTY.
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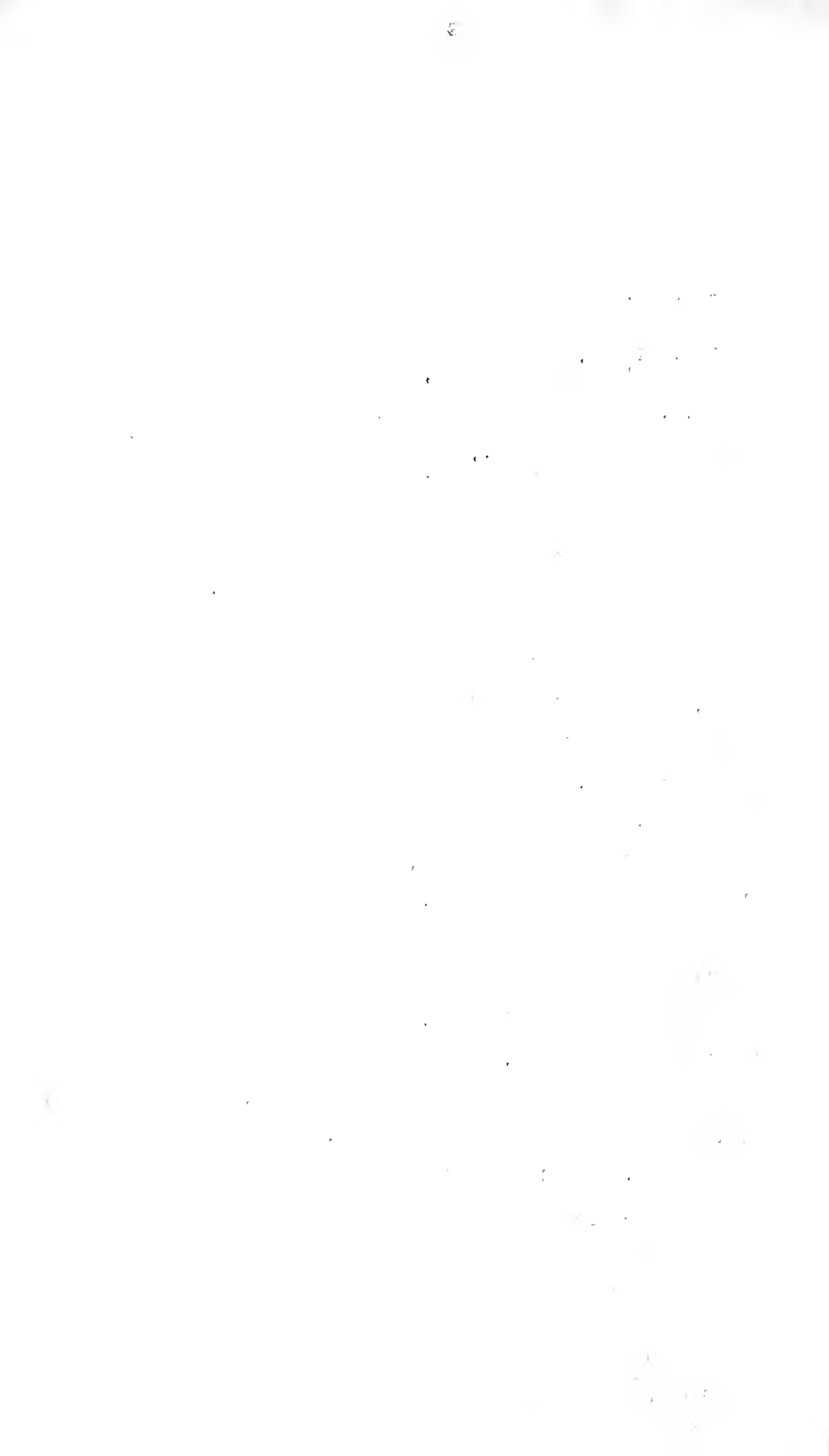
MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

The judgment in the record is of nil capiat and for costs, and plaintiff assigns as error for reversal the ruling of the trial court in sustaining the demurrer of defendant to the replication of plaintiff to defendant's third plea. There were in the trial court two cases which were consolidated for hearing, and the abstract shows the pleadings in but one of them.

There does not seem to be any contention but what the limitation plea was good unless it was avoided by the averments of the replication, which is in confession as to the truth of the plea, but there is an attempted avoidance of its effect by a statement of facts which, it is contended, avoids the effect of such limitation.

This case falls within the logic and reasoning of Phoenix Ins. Co. v. Lebcher, 20 Ill. App. 450, in which the court said:

"The clause in the policy sued on which limited the time for bringing suit thereon to within twelve months next after the date of the fire from which the loss occurs, is a valid and binding agreement between the parties, and furnishes a legitimate defense to the company where suit is not brought within the time limited, unless it appears that the company has waived the limitation or has estopped itself from asserting such



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defense by holding out reasonable hopes of an adjustment and settlement without suit, sufficient to actually deter the claimant from bringing suit until after the expiration of the time limited. *Peoria Marine Ins. Co. v. Whitehall*, 25 Ill. 466.

The mere pendency of negotiations during a part of the period of limitation, conducted in good faith, with a view to a compromise, is no waiver of the limitation and will not estop the company from setting up the defense. *Gooden v. Amoskeag Fire Ins. Co.*, 20 N. H. 73; *May on Insurance*, sections 485-488, and cases cited."

However, in the instant case nothing in the plea set up deterred plaintiff from commencing suit within the limitation period, for the suit was commenced in apt time. The difficulty arose in the filing of a new declaration and abandoning the original one after the expiration of the limitation, which new declaration stated a new cause of action.

It is said that as to the suit in which there is no abstract the limitation clause of the policy had not run. In the state of the record, there being no abstract of the pleadings in that case, we are unable to say whether or no such contention is well taken. As said by this and the Supreme court in numerous cases, the abstract is the pleading of the parties and sufficient must appear therein to support the errors assigned, and a court of review will not look to the record for reasons to reverse a judgment where no such reasons appear from the abstract.

Finding no error calling for a reversal of the judgment of the Circuit court, it is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.



181 - 25953

ERMA BELTER,)
Appellant,)

vs.)

FRED E. BELTER,)
Appellee.)

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

FRED E. BELTER,)
Appellee,)

vs.)

ERMA BELTER,)
Appellant.)

CROSS-BILL.

219 I.A. 642

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

The parties to the bill and cross-bill in this case are husband and wife. Complainant, the wife, filed her bill for separate maintenance grounded upon the desertion of defendant and that she was living separate and apart from her husband without her fault. Defendant answered this bill and filed his cross-bill asking for divorce on the grounds that his wife had been guilty of improper relations with other men, naming one of them, and that she frequented public dances, cabarets, public restaurants, and other places of a notorious character with the aforesaid named man and also with other men. Other charges of improper conduct were made and desertion by the wife charged. Many charges likewise were made against his mother-in-law, whom he accused of wrangling, nagging, abusing and finding fault with him.

The defendant in both the bill and cross-bill filed an answer denying the material charges made each against the other. There was a decree on the cross-bill divorcing the parties for complainant's desertion, and a dismissal of the original bill

for separate maintenance, from which decrees the wife prosecutes this appeal.

Notwithstanding the serious charges of infidelity made by the husband against his wife, no attempt was made to prove any one of such charges, but the husband relied upon the wife's alleged desertion for the statutory period as grounds for relief under his cross-bill. The learned chancellor found that the desertion was that by the wife of the husband, not conversely, as the wife contended. This we think was manifestly contrary to the great preponderance of the proofs.

It appears that at the time of the alleged desertion the parties lived with the wife's mother; that the husband came home on the night of August 15, 1918, packed his clothes into his grip, taking the wedding ring from his wife, and on going out said to his wife's mother, "Well, mother, I will see you later on." After this time the husband made no effort to see his wife and did not contribute to her support until an order for temporary alimony was made against him. He made no attempt to provide a home for his wife other than his mother-in-law's. It appears that the wife's mother was inclined to be a little irritable when not well, as the wife admitted in her testimony; but it is not contradicted that on the whole the mother-in-law was a source of great help and assistance to her daughter and her daughter's husband; that when first married the husband was in rather bad financial circumstances and that the mother-in-law furnished shelter for him and his wife, charging him but three, four and five dollars a week for the board and lodging of himself and wife.

There is no proof worthy of belief that the wife's mother was guilty of any reprehensible conduct toward the defendant, the cross complainant. Furthermore, complainant made several bona

fide efforts to induce her husband to resume the marital relation. She offered several times to live with him and requested him to return to her. There were several proceedings in the Court of Domestic Relations in which complainant sought to have her husband return to her, but without success. He flatly refused on these occasions to resume the marital relation, and aside from his claim of desertion there is no evidence in the record of any misconduct or unwifely actions on the part of complainant. There were three unimpeached witnesses, including the late Mr. Charles Arnd, a reputable lawyer of the Chicago bar at the time, to the effect that complainant requested her husband to return to her and offered to live with him as his wife, and that he absolutely refused, saying, "It is too late; it is too late; I cannot live with her any more," etc.

A correct solution of the questions of fact in this record clearly sustains the averment of complainant's bill of her husband's desertion without any cause created by her, and she is therefore entitled to prevail and to have a decree entered in her favor for a separate maintenance as prayed in her bill.

The decrees dismissing the bill of complaint for want of equity and granting a decree of divorce to the husband on his cross-bill are wrong. These decrees are therefore reversed and the cause is remanded with directions to the Superior court to enter a decree granting complainant separate maintenance from her husband, as prayed for in her bill, dismissing the cross-bill of the husband for want of equity, and including in the decree such allowances for alimony and solicitors' fees as the necessities of the wife may require and in accord with the ability of the husband to furnish.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever and McSurely, JJ., concur.

264 - 26036.

J. P. BRAY,
Appellant,
vs.
GEORGE A. SEAVENUS, Jr.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 643

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of nil capiat entered on a finding of the trial judge, to whom the cause was submitted for trial by agreement of the parties.

The parties to this action were insurance brokers in the office of Marsh & McLennan, insurance agents in Chicago.

It is the contention of plaintiff that in December, 1916, he procured for defendant the business of insuring the automobiles of the packing house of Armour & Company scattered all over the United States at points where they conducted their business. Defendant at this time wrote most of the insurance for the Armour Company but did not write any automobile insurance for them; that as compensation for this service plaintiff claims defendant agreed to divide commissions paid for such automobile insurance.

While defendant repudiated any legal liability to pay plaintiff anything on account of the Armour automobile insurance, and notwithstanding defendant claims that plaintiff disclaimed any right to any remuneration on account of any service he may have rendered in the matter, still defendant

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promised him seven and one-half per cent of the original premiums paid, to be paid to him in quarterly instalments.

Among other facts it appears that on December 3, 1917, plaintiff started a suit in the Municipal Court of Chicago against defendant, claiming \$932.15 to be due him on Armour automobile insurance. When defendant was served with summons in this suit he sought plaintiff, arranged to and did pay him \$500 on account, promising to pay the balance on or before January 14, 1918, which, being acceptable to plaintiff, he promised to dismiss the suit. This promise he failed to perform. Instead, he took judgment against defendant on default day. After receiving payment of the judgment in full plaintiff started garnishee proceedings against Marsh & McLennan. He caused an execution on the Municipal Court judgment to be returned defendant not found, etc., at a time when he knew defendant was daily in the same office (Marsh & McLennan) as himself. When the facts were made known to the Municipal Court in an appropriate motion it ordered the judgment satisfied.

While many points are discussed on the errors assigned, we shall confine our decision as to the weight of the evidence and the law regarding the application of the Statute of Frauds to the contrast between the parties claimed by plaintiff.

A court of review will be reluctant to disturb the findings of fact of a trial judge and will not do so unless the record clearly shows that such finding is manifestly against the weight of the evidence. Springer v. David Bradley Mfg. Co., 191 Ill. App. 45; Calvert v. Carpenter, 96 Ill. 63.

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It is patent that plaintiff was discredited by some extremely glaring unethical conduct on his part.

Plaintiff's actions regarding the Municipal Court suit against defendant as hereinabove recited were most discreditable to him and affect adversely his credibility. Moreover, in many vital matters about which he testified he was contradicted by the testimony of credible witnesses whose testimony was unimpeached.

If the contract claimed by plaintiff was vulnerable against legal attack it was not sustained by a preponderance of the evidence.

The contention of defendant that he only promised to pay plaintiff seven and one-half per cent of the original premiums on Armour automobile insurance was sustained by a clear preponderance of the evidence, and the contention that defendant agreed to divide equally his commissions on all insurance premiums thereafter paid on Armour automobile insurance was successfully refuted by a preponderance of the evidence.

It appears that the contract between plaintiff and defendant regarding the commissions was to extend from year to year so long as defendant did the Armour underwriting on its automobiles. Such a contract is clearly within the Statute of Frauds of this state, which provides that a contract not to be performed within one year from its making is void unless such contract shall be in writing signed by the party to be charged. Chap. 59 R. S.; Taylor v. Scott, 178 Ill. App. 487.

Seeing no reason in this record for disturbing the judgment of the Municipal Court, it is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

WILLIAM D. BIEL,

VS.

LILLIAN ALLER.

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

219 I.A. 643

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This is a "forcible detainer" suit in which both parties claim a right to the possession of the premises in question under the fee owner, Mayo Friedberg.

The plaintiff claims under a written lease from the owner for a term commencing October 1, 1919, and ending September 30, 1920. This lease was offered and received in evidence. At this time defendant was in possession under a written lease expiring September 30, 1919, as she admits. A sixty day statutory notice that the term then ended was duly served upon defendant in apt time. However, she contended in the trial court, and so contends here, that she had an oral agreement with the rent collecting agent of the owner that she might continue in possession until May 1, 1920. This agreement was denied by the rent collecting agent. In the trial court there was a finding and judgment for plaintiff, and defendant appeals.

There was no denial at the trial that defendant was in possession of the premises in question. She took the witness stand and swore that by an agreement with Lowenstein she was entitled to continue in possession until May 1, 1920.

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Moreover, if her story be true that Lowenstein granted her an extension of the time of occupancy if she paid ten dollars, then, as she admits she did not pay the ten dollars, she has not sufficiently complied with the terms of the agreement she states as to make it operative.

Furthermore, there is no evidence that Lowenstein was anything more than the agent of the owner to collect rents or that he had any authority to make any agreement to extend the term of the existant lease. Agency cannot be presumed; when invoked it must be proven, the same as any other fact, in order to make it available for any purpose.

The lease to defendant from the owner was properly admitted in evidence as tending to prove the right of plaintiff to possession. The right to possession was the sole question to be determined by the court, and as defendant failed to prove any right to continue to hold possession as against plaintiff's right to such possession, in virtue of the lease in evidence from the owner, he was entitled to prevail in the action.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

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344 - 26116.

THE PEOPLE OF THE STATE OF
ILLINOIS, for the use of the
OAK PARK TRUST AND SAVINGS
BANK, a corporation,

Appellee,

vs.

JOHN A. McCORMICK, GEORGE T.
HICKS, Trustee, JOSEPH HEN-
DRICKS, Trustee, EDWARD T.
NOONAN and JOSEPH HENDRICKS,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2191.A. 643

MR. PRESIDING JUSTICE HOLBOM

DELIVERED THE OPINION OF THE COURT.

This is an action upon an appeal bond in the penalty of \$5,000. With the declaration was filed an affidavit of claim, to which defendants interposed several pleas with an affidavit of meritorious defense, which, on motion, was stricken as not stating facts which constituted in law a defense to the action. Subsequently two amended affidavits of meritorious defense were successively filed by leave of court which were on motion likewise stricken as stating no facts which constituted a meritorious defense. Thereupon, on motion of plaintiffs, the pleas were eliminated for want of a sufficient affidavit of merits and a judgment as by default was entered by the court in favor of plaintiff and against defendant for \$5,000 debt and damages \$4302.64, debt to be discharged on payment of damages and costs, from which judgment defendants prosecute this appeal and ask a reversal.

From the foregoing recitation it is seen that this appeal presents for our determination whether the facts

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stated in the last of said three affidavits constituted in law a meritorious defense to the action counted upon in the declaration of plaintiff.

The errors assigned are embraced within the rulings of the court striking the affidavits of merits from the files and also in striking the pleas and in entering judgment as in cases of default.

The bond in suit is the contract of the parties, and whether statutory or one given in accord with the course of the common law, is enforceable.

The amended affidavit of merits did not state any facts which constituted a defense, either meritorious or legal, to the bond in suit, but on the contrary stated many facts which were in themselves amply sufficient to support the action and justify a judgment for plaintiff. It is in accord with approved practice to strike pleas from the cause where there is no affidavit of merits on file. Where an affidavit of merits is stricken because it lacks facts which constitute a meritorious defense to the action the pleas fail as a defense and are properly stricken, when the cause is treated as one where no affidavit is filed and the pleas are likewise stricken without regard to their sufficiency as pleas stating a good defense. In such state of the record it is the correct practice to enter judgment as in cases of default. Reddig v. Looney, 208 Ill. App. 413; Cramer v. Commercial Association, 260 Ill. 516. In Firestone Tire Co. v. Ginsburg, 285 *ibid* 132, it is said:

"Where an affidavit of merits is insufficient, it is proper practice to strike it from the files and the

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plaintiff is then entitled to judgment as in case of default. After an affidavit of merits has been stricken from the files it is not necessary to strike the pleas from the files, although the practice is not improper and is common."

It is seriously contended by defendants that the giving of the bond in suit was procured by duress. However, there is no warrant in the record for holding that the bond was procured by duress. In short, the claim is made that a former bond was given which was regarded as insufficient and a new bond was requested and the one in suit given. But, forsooth, said bond, it is contended, would not have been given but for the threat made that the trial judge would not sign and seal the bill of exceptions in the case unless a new bond was given and that defendants yielded to such threat and gave the bond in suit. In the first place, the trial judge could have been compelled by mandamus to settle and sign a bill of exceptions if he arbitrarily and unlawfully refused to do so upon presentation. Furthermore, the recitations of the bond have not been and cannot, under the law, be denied. The judgment appealed from is correctly recited in the bond, the Supreme Court reviewed the judgment of the County Court appealed from and defendants have ^{had} the benefit of the appeal by obtaining the review of the judgment against them by the Supreme Court, to which tribunal the appeal was prayed.

There is nothing in the bond that contravenes public policy. It was voluntarily given at the time and defendants have enjoyed all the benefits of delay in the execution of the judgment appealed from and the review of the Supreme Court thereon. Pritchett v. The People, 6 Ill. 525. These were

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all the benefits defendants sought. These benefits were obtained in virtue of the bond. They cannot now be heard to repudiate their contract in the verity of which they received the benefit of the privilege of a review of the nisi prius judgment. Mix v. The People, 36 Ill. 329. As the court said in Kotite v. The Title Guarantee & Surety Co., 191 Ill. App. 555, so say we here:

"The judgment debtor used the bond here sued on to procure a review by this court of the judgment against him, and the surety by joining in the bond enabled him to do so, and having obtained all the benefit of the bond they should be estopped from denying that it is a binding obligation."

There is no merit in any of defendants' contentions, and the record of the Circuit Court being free from reversible error, its judgment is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

MARION E. DAVENPORT,
Plaintiff in Error,
vs.
JOHN LOUIS DAVENPORT,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

219 I.A. 643

MR. JUSTICE DEVITT DELIVERED THE OPINION OF THE COURT.

Marion E. Davenport filed her bill of complaint in the Superior court of Cook County June 12, 1918, in which she charged her husband, John Louis Davenport, with desertion. July 23, 1918, John Louis Davenport filed his answer thereto, in which he denied that he was or had been guilty of desertion and charged complainant with adultery. Thereafter defendant filed a cross-bill and later a supplemental cross-bill, in which he alleged that he is a resident of Cook County and has been a resident of the State of Illinois for thirty years last past. Complainant filed an answer to this supplemental cross-bill, in which she admitted cross-complainant "is an actual resident of Cook County and is and has been a resident of the State of Illinois for thirty years last past.

The issues made up by the pleadings were submitted on evidence to a jury, which returned a verdict finding the complainant not guilty of adultery and that complainant was living separate and apart from defendant and cross-complainant without fault on her part. The jury also returned a verdict which found the complainant, Marion E. Davenport, guilty of an attempt to kill cross-complainant, as charged in his cross-bill. A decree was entered in the cause awarding defendant and cross-complainant a decree of divorce. The decree recites inter alia:

"The court finds that it has jurisdiction of the parties hereto and the subject-matter hereof, and that said verdict is well founded and is responsive to the issues and supported by the proofs offered in open court upon the trial of said cause, and that the said Marion Davenport did, on to-wit, November 23, 1918, make a willful attempt to take the life of the defendant and cross-complainant, John Louis Davenport, subsequent to her marriage with him, by means showing malice, to-wit, by means of a loaded pistol which she fired at him, as is alleged in the supplemental cross-bill heretofore filed by the cross-complainant in the above entitled cause."

Complainant and cross-defendant seeks by writ of error to reverse this decree for the reasons, as asserted, first, that the record does not disclose that cross-complainant was a resident of the State of Illinois for one whole year next before filing his cross-bill of complaint; and, second, that the verdict of the jury was insufficient in that it failed to recite that the complainant had attempted to take the life of cross-complainant by means showing malice.

The supplemental cross-bill alleges that the cross-complainant "had been a resident of the State of Illinois for 30 years last past," and the answer filed thereto by the complainant admits that cross-complainant has been a resident of the State of Illinois for "30 years last past." The decree entered in the cause specifically recites that the court had jurisdiction of the parties and of the subject matter.

The evidence submitted to the jury is not preserved by either party to the litigation. The issues were, however, tried before a jury, and such being the fact it was not incumbent upon the party in whose favor the decree was entered to preserve the evidence admitted on the trial.

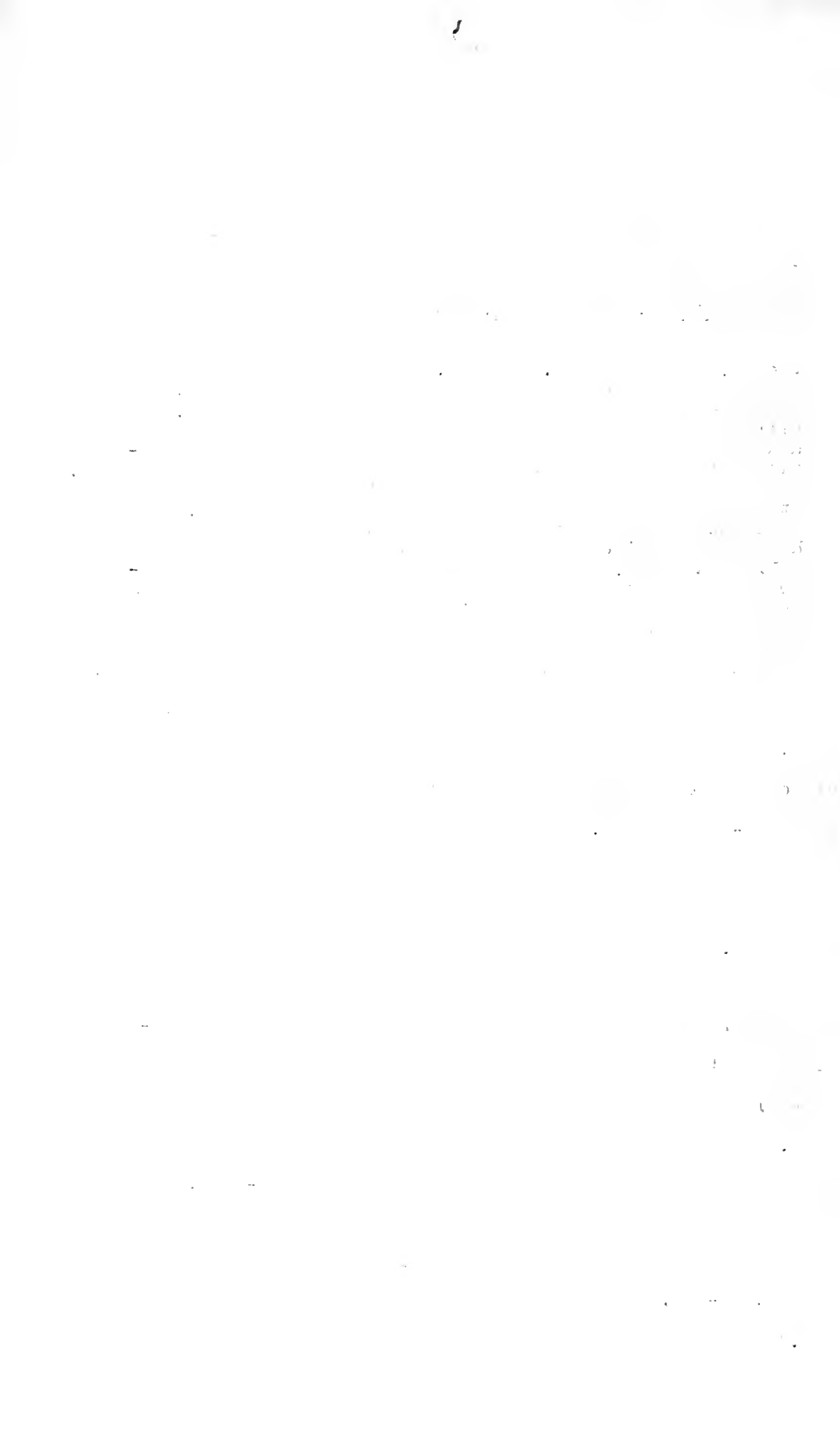
In the case of Lyons v. Lyons, 272 Ill. 329, the Supreme court said:

"It is insisted that it does not appear from any recital in the decree that appellant has resided in the State of Illinois more than one year before filing her bill; that

this was necessary to give the court jurisdiction, and that the recital in the decree that the court had jurisdiction of the subject matter and of the parties is wholly insufficient. Upon that question reliance is principally placed upon Becklenberg v. Becklenberg, 232 Ill. 120. That case held that such recitals of jurisdiction were not sufficient to sustain a decree where the evidence is not preserved in the record. In that case, however, there was no admission in the answer that complainant had been a resident of Illinois more than a year continuously before filing the bill. The bill alleged complainant was a resident of Cook County and had been an actual resident of the State of Illinois continuously more than one year preceding the filing of the bill. The answer admitted complainant had been a resident of the State of Illinois 'for more than one year last past.' The court said the answer was not an admission that complainant had been a resident of Illinois one whole year next before filing the bill. In the case under consideration the answers to the original and amended bills admit appellant had been a resident of Illinois 'for many years last past.' This is to all intents and purposes as effective as would have been an admission that she had been a resident of Illinois more than one year continuously just before filing her bill."

To the first point made it may be answered, therefore, that the admission in the pleadings of complainant preclude her from raising the question of the court's jurisdiction of cross-complainant, and that in that the case was tried before a jury it will be presumed that sufficient evidence was introduced in support of the verdict of the jury and the decree of the court.

The supplemental cross-bill charged that complainant had unlawfully and maliciously attempted the life of cross-complainant with a pistol by attempting to shoot him with the intention of so doing and to wilfully and maliciously take his life. The verdict of the jury found that defendant had attempted to kill cross-complainant as charged in the cross-bill, which recites that complainant made a willful and malicious attempt to take the life of defendant and cross-complainant "by means showing malice, to-wit, by means of a loaded pistol which she fired at him."



In the case of Berg v. Berg, 223 Ill. 200, the Supreme court said:

"In cases where the parties are entitled to a trial by jury the rule is different, and the evidence does not have to be thus preserved. This has been held to be true in cases of divorce, and formerly in cases of mechanics' liens, the presumption in such cases being in favor of the verdict until it is successfully impeached in some mode provided by law. Becker v. Becker, 79 Ill. 332; Thatcher v. Thatcher, 17 id. 66; Lewis v. Rose, 82 id. 574."

The verdict of the jury finds that complainant attempted to take the life of cross-complainant as charged in his cross-bill, and the charge in the cross-bill is that the assault was made maliciously. The decree recites that the assault was made by means which showed malice as charged in the cross-bill.

The points made against the validity of the decree are extremely technical and it is our view that on the record before us the decree ought to be affirmed.

AFFIRMED.

Holdom, F. J., and McSurely, J., concur.

GEORGE A. MARKS,
Plaintiff,

vs.

DONALD J. O'DONNELL et al.
Defendants.

JOHN GUSKAY,
Appellant,

vs.

GEORGE R. MARTIN, Receiver,
Appellee.

2191A 643

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Guskay from a decree of the Circuit court of Cook County entered June 13, 1919, which set aside and vacated a prior order of the court approving a final report of the receiver and which disallowed the receiver the sum of \$737.21 which had been credited to him in his final report. The receiver appealed from the decree of June 13, 1919, to this court and the appeal was decided in case No. 25916 (opinion not yet reported.)

A part of the history of the litigation is set forth in the opinion filed in that case, and it will not be necessary to state here more than the fact that Guskay insists that the decree erroneously allowed the receiver certain credits which it is claimed were unwarranted by law and the facts of the case.

It is our opinion that the decree must be affirmed.

The evidence introduced on the hearing does not appear in the record. The decree of June 13, 1919, sets forth findings of fact in support of the conclusions of the chancellor, and we

are not permitted to question the correctness of such findings of fact and conclusions in the absence of the evidence introduced on the trial.

The decree of the Circuit court will therefore be affirmed.

AFFIRMED.

Heldom, P. J., and McSurely, J., concur.

157 - 25928

GEORGE M. LAMBIN,
Appellee,

vs.

THE REMMERS SOAP COMPANY,
a corporation,
Appellant.

SUPREME MUNICIPAL COURT
OF CHICAGO.

219 I.A. 644

MR. JUSTICE DRIVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant ^{corporation} in the
Municipal court of Chicago.

The litigation grew out of a contract of employment entered into between plaintiff and defendant December 21, 1917, under which defendant employed plaintiff as a salesman to sell soap, manufactured by defendant, in Cook, Lake, Kane and DuPage Counties, Illinois.

In a statement of claim filed by plaintiff it is alleged that there was due him at the time suit was brought for commissions the sum of \$3,351.82. In defendant's affidavit of defense it is stated that the parties to the contract entered into a subsequent oral agreement to the effect that certain expenses incurred by defendant in assisting plaintiff in the sale of its product in the territory mentioned were to be chargeable to the plaintiff. These expenses, it is alleged, amounted to a total sum of \$5,500, which more than offset the plaintiff's claim against defendant.

The original written contract, which it is claimed was modified by a subsequent parole agreement, contains the following provision:

"There is to be no expense for advertising or sales help of any kind to be borne by either of us unless by mutual agreement in writing."

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Mr. Spencer, sales manager of defendant, testified that in a conversation with plaintiff in January, 1914, he, the witness, stated that it would be necessary to hire special salesmen; that plaintiff at this time agreed that in return for the promises of defendant to stand the expense of certain advertising he would pay whatever expense was incurred in employing these additional salesmen.

Mr. Bell, for the defendant, testified to certain statements which tended to prove admissions by plaintiff that salaries for salesmen were to be charged to him. Plaintiff's testimony directly contradicted that of Mr. Spencer. Plaintiff denied that anything was said in the course of the conversation with Mr. Spencer concerning either the expenses to be incurred for salesmen or advertising. He stated that he was never informed that he would be charged with any expenses as testified to by Mr. Spencer. Correspondence between the plaintiff and defendant was introduced which it is asserted tends to corroborate the testimony of the plaintiff. Judgment was entered in favor of the plaintiff for the sum of \$2425.24 and defendant appeals.

It is urged on behalf of defendant that the judgment of the court is against the weight of the evidence. The defendant attempted to show that the written agreement had been modified by a mutual parole agreement of the parties. The burden, then, rested upon it to show that the written agreement had been so modified. Croft v. Perkins, 174 Ill. 627.

There is a direct contradiction in the evidence concerning the alleged parole agreement. Mr. Spencer and the plaintiff directly contradict each other. There is some evidence in the record which tends to corroborate the statements of each. Under these circumstances the trial judge, who heard and saw the

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

Printed by

JOHN BURNET

AT THE SIGN OF THE

ROSE IN ST. MARTIN'S

CHURCH

1679

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witnesses, was in a much better position to judge of the weight of the evidence than is this court.

There is some evidence tending to support the position of each party to the suit, and we are unable to say that reversible error was committed in finding the issues for the plaintiff.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Holdom, J. J., and McSurely, J., concur.

178 - 25950

DAVID L. MOSS, doing business
as DAVID L. MOSS & CO..

Appellee,

vs.

SAMUEL MITTELMAN and NATHAN
MITTELMAN, doing business as
MITTELMAN BROS..

Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2191A.644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court of Chicago against the defendant for the sum of \$150, and defendant appeals.

Suit was brought upon a contract dated New York, October 15, 1917, under which the defendants by S. Mittelman agreed to purchase 5000 pounds of granulated egg yolk powder from plaintiff for 43 cents a pound. The goods were to be shipped to defendants at Chicago at a time prior to January 31, 1918, at the buyer's option, and payment was to be made therefor net cash five days after their arrival. The contract also provided that all claims in connection therewith were to be presented within seven days from the date of the receipt of the goods, and that any differences between the parties were to be adjusted by arbitration in New York.

The case was tried before a jury. No evidence was introduced on behalf of the defendant. Plaintiff's evidence discloses that after the contract was entered into the plaintiff, on January 7, 1918, wrote to defendants asking them to "advise us when you want us to have the goods shipped to you, as we have these ready in stock available at your order. The time for shipment expires on the 31st of this month and would therefore kindly request you to give us instructions as early as possible."

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Defendants seem to have paid no attention to this letter and plaintiff at the end of January shipped the goods to Chicago, drawing a sight draft which, with the bill of lading, accompanied the goods to Chicago. No response was made to plaintiff by defendants either after the goods had arrived in Chicago or when the sight draft had been presented to them for payment on two or three occasions, until March 2, 1918, when defendants wrote plaintiff a letter in which, for the first time, they intimated their objection to receiving the goods, giving as their reason that plaintiff had shipped the goods "in sight draft against B. L." In this letter defendants stated that they did not need any egg yolk powder at the time, but that they would accept the goods at a price of forty-one cents a pound, the then market price in Chicago.

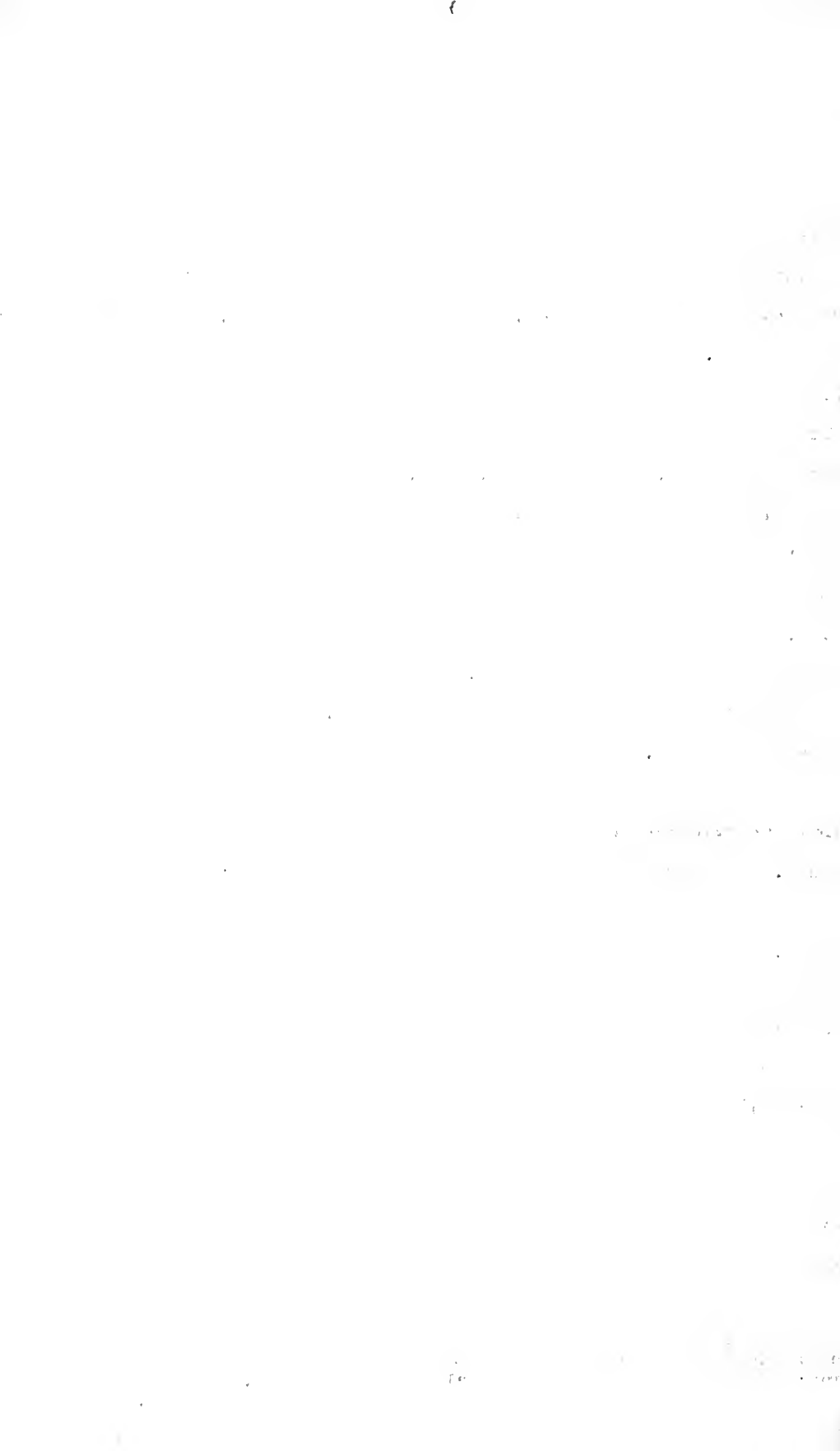
We do not think there is much merit in the claim that the evidence does not sustain the judgment of the trial court. It is undisputed that plaintiff made every reasonable effort to deliver the goods in accordance with the terms of the contract. It is true that a sight draft with bill of lading attached accompanied the goods to Chicago, but it was only after this draft was presented several times to the defendants that the excuse was made for the first time that the goods were not to be paid for until five days after their delivery. We think that on the whole evidence the court was warranted in disregarding this defense. It is our opinion also that there is no merit in the contention that plaintiff failed properly to prove the amount of damages he sustained by reason of defendant's breach of the contract.

Some valid objection is made to certain of the instructions given by the court to the jury. But in view of the character of the evidence the instructions given were not so erroneous as to authorize a reversal of the judgment.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Heldom, P.J., and McSurely, J., concur.



187 - 25959

H. FETTY,
Appellee,

vs.

WALTER R. PARKER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2191 A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Judgment was entered for \$23.25 against defendant in the Municipal court of Chicago, which he seeks by this appeal to reverse.

Suit was brought by plaintiff on a promissory note dated November 13, 1916, payable to the State Street Telephone Company. The note was executed by defendant and it provided for the payment by him of \$35.00, \$10.00 down and the balance at the rate of \$5.00 a month. This note was endorsed by the payee and was delivered by him to the Empire Security Co., which in turn delivered it to the Fort Dearborn Trust & Savings Bank, which transferred it to the plaintiff.

The abstract of record filed in this court gives us no information as to what the suit is about. It merely shows that a statement of claim with affidavit was filed by plaintiff; that trial was had without a jury and judgment entered for plaintiff. We have held in numerous cases that failure to present to us, in compliance with the rules of this court, a proper abstract of record is of itself sufficient to warrant an affirmance of the judgment. For this reason, if for no other, the judgment must be affirmed. We have, however, examined the evidence as shown by the abstract of record, and it is our opinion that no error was committed by the trial Judge which would authorize a reversal of the judgment. So far as the evidence shows, plaintiff



was an innocent holder of the note and received it in due course. Evidence offered by defendant was excluded which it is said would have shown payment in full of the note to the payee named therein. If we assume this to be true, it does not militate against the right of the plaintiff to recover on the note. It is our opinion that the affidavits filed in support of the motion for a new trial were insufficient.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

201 - 25973

JACOB KADERA and MATILDA
KADERA,

Appellants,

vs.

MORAVA BUILDING AND LOAN
ASSOCIATION, a corporation,
Appellee.

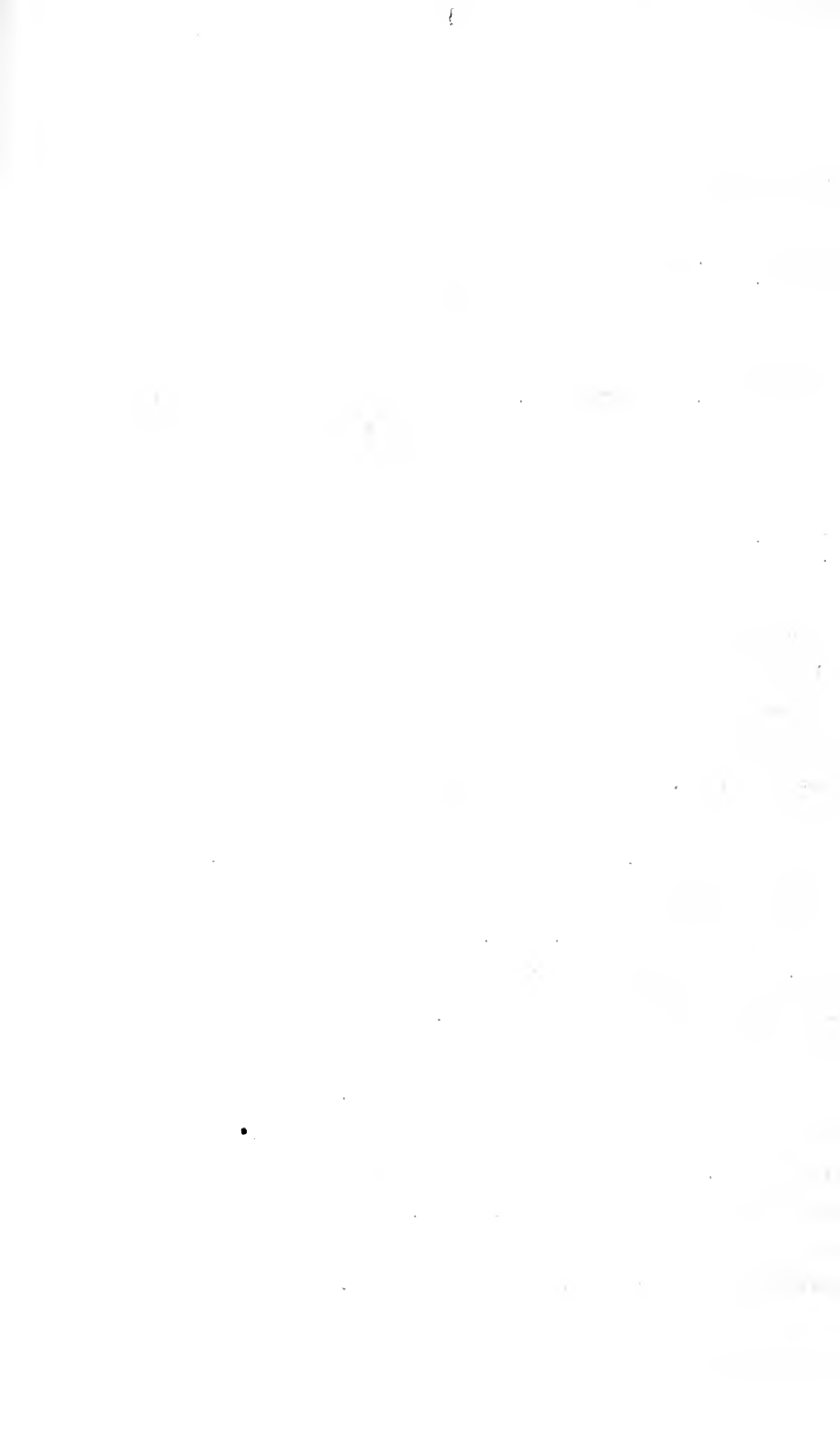
APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

219 I.A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Jacob Kadera and Matilda Kadera filed their bill of complaint in the Superior court of Cook County in which they prayed that the defendant, Morava Building and Loan Association, be decreed to execute to complainant a release of a certain mortgage on real estate given to secure the payment of a principal sum of \$1,400, which complainants had borrowed from defendant. The transactions which resulted in the execution and delivery of the mortgage occurred during the years 1914 and 1915. Joseph A. Cerny was secretary of defendant from the date of its organization in 1911 to January, 1917, and he was also during this time engaged on his own account doing a real estate business at 2330 South Sawyer avenue, Chicago. Defendant's office was located at 2300 South Homan avenue, a distance of about one-fourth of a mile from Cerny's real estate office. The evidence introduced on the trial tends to prove that Cerny had custody of defendant's securities, papers and records. It was a part of his duties as secretary to draft mortgages, notes, release deeds, etc., for defendant, and generally he conducted negotiations with stockholders and others doing business with it.

Under defendant's by-laws Cerny was required "to preserve the records of the Association, to keep its accounts



by a double entry system prescribed by the board, to collect all dues, interest, fines, and other moneys that may be due the Association and receipt for the same, paying the funds collected to the Treasurer at every regular meeting of the board, and taking his receipt therefor. "Jointly with the president he is empowered to release Association mortgages when a loan has been repaid in full, and upon such release he shall return to the borrower all papers held by the Association and appertaining to such loan."

Section 3 of Article 11 of the by-laws is as follows:

"The Treasurer shall not receive any moneys for the Association except from the Secretary."

Section 7 of Article 12 provides that -

"A borrower may repay a loan at any time, in part or full, by giving thirty (30) days notice to the Association of his intention of so doing."

Illinois Statutes provide that -

"Any member who shall have obtained a loan or advance on his shares, and who shall have given real estate as security, may at any time upon giving thirty days' previous notice in writing repay the same."

* * * * *

"Provided, that all settlements made in periods intervening between stated monthly meetings of the directors shall be made as of the date of the stated monthly meeting next succeeding any such settlement." * * * * * (Hurd's R. S., ch. 32, sec. 83b, 6c; J. & A. Ann. Stat., sec. 266.)

The mortgage which was given to secure the payment of the loan to complainants was dated January 19, 1915. After its execution and delivery Jacob Kadera became in arrears in payments due defendant and he applied to Cerny, defendant's secretary, for a private loan for the purpose of paying off the mortgage. Cerny applied to one Smidl, who on previous occasions had purchased mortgages from him, to make the loan to Kadera. Smidl agreed to accept a mortgage to be executed by Kadera and his wife in exchange for a mortgage then held by him which he had purchased from Cerny. The latter mortgage, being the third mortgage involved in the transaction, was for a sum sixty dollars less than the amount of

the second mortgage which was executed by Kadera and his wife for the purpose of procuring a sufficient sum to pay off the first mortgage. To make up the difference between the second and third mortgages Smidl delivered his personal note to Cerny for the sum of \$60. The second mortgage was given to secure the payment of \$1500 and was executed May 13, 1916; this mortgage was turned over by Cerny to Smidl for the third mortgage which was executed by one Musil. This third mortgage was sold by Cerny to one Pecha, who delivered to Cerny his check for \$1448.04 in payment therefor. At this time Cerny stated he was secretary of the defendant association and that he would pay complainant's indebtedness to it out of the sum received from Pecha. Some days after the closing of the transaction, that is, after the delivery of the second mortgage to Smidl and the sale of the third mortgage to Pecha and the receipt of payment therefor by Cerny, Jacob Kadera requested Cerny for a release deed of the first mortgage which had been executed to secure the indebtedness to defendant. At this time Cerny promised to procure the release deed and he delivered a statement to Kadera which showed that he, Cerny, had received the sum of \$48.72 in excess of the sum due defendant by complainant. This excess amount was paid to Kadera by Cerny.

The evidence shows that Cerny in January, 1917, was discovered to have embezzled the money paid to him by Pecha and which was intrusted to him for the purpose of paying complainant's indebtedness to defendant. On a trial of the issues complainant's bill was dismissed for want of equity. Complainants bring the case to this court by appeal.

The material facts of the case do not seem to be in dispute. The evidence shows that when Kadera made his application to Cerny for a loan to pay off the indebtedness to

defendant. Cerny in his private capacity had agreed to procure the amount necessary for this purpose. At or just before the time the transactions were completed complainants were indebted to defendant in a sum \$48.72 less than the amount paid to Cerny by Pecha, and this excess sum was paid by Cerny to complainant Jacob Kadera. Several months thereafter it was discovered that Cerny, in violation of his trust, had embezzled the money which was unquestionably paid to him for the purpose of extinguishing complainants' indebtedness to defendant; it is urged that Cerny received this payment as secretary of defendant and within the apparent scope of his authority as such.

It is said that under defendant's by-laws Cerny had no authority to receive on behalf of defendant any payments of money except such as had become due to defendant, and strictly and technically this is the language of the by-laws. We are inclined to think, however, that under the authority of cases decided by the Supreme court it would be a too narrow construction of these by-laws to hold that a secretary of a building and loan association acting under by-laws such as those in evidence would have power to accept payment on behalf of his principal only when such debts had become due in a strictly legal sense. Cerny was clothed with apparent authority to negotiate loans made by defendant. The evidence shows that the complainants were in arrears in payments due defendant at the time that Cerny received on complainants' account sufficient money to pay the amount due under the first mortgage, and we think it was well within the apparent scope of Cerny's authority under the circumstances to accept on behalf of defendant payment in full of complainants' indebtedness to defendant.

In the case of Prairie State Loan Association v.

Nubling, 170 Ill. 240, the Supreme court said:

"Common knowledge of the general conduct and management of associations known as building associations shows that in the majority of cases the secretary of such an association has largely the control of the details of its business. He generally possesses the confidence of its members and patrons, who largely rely on him."

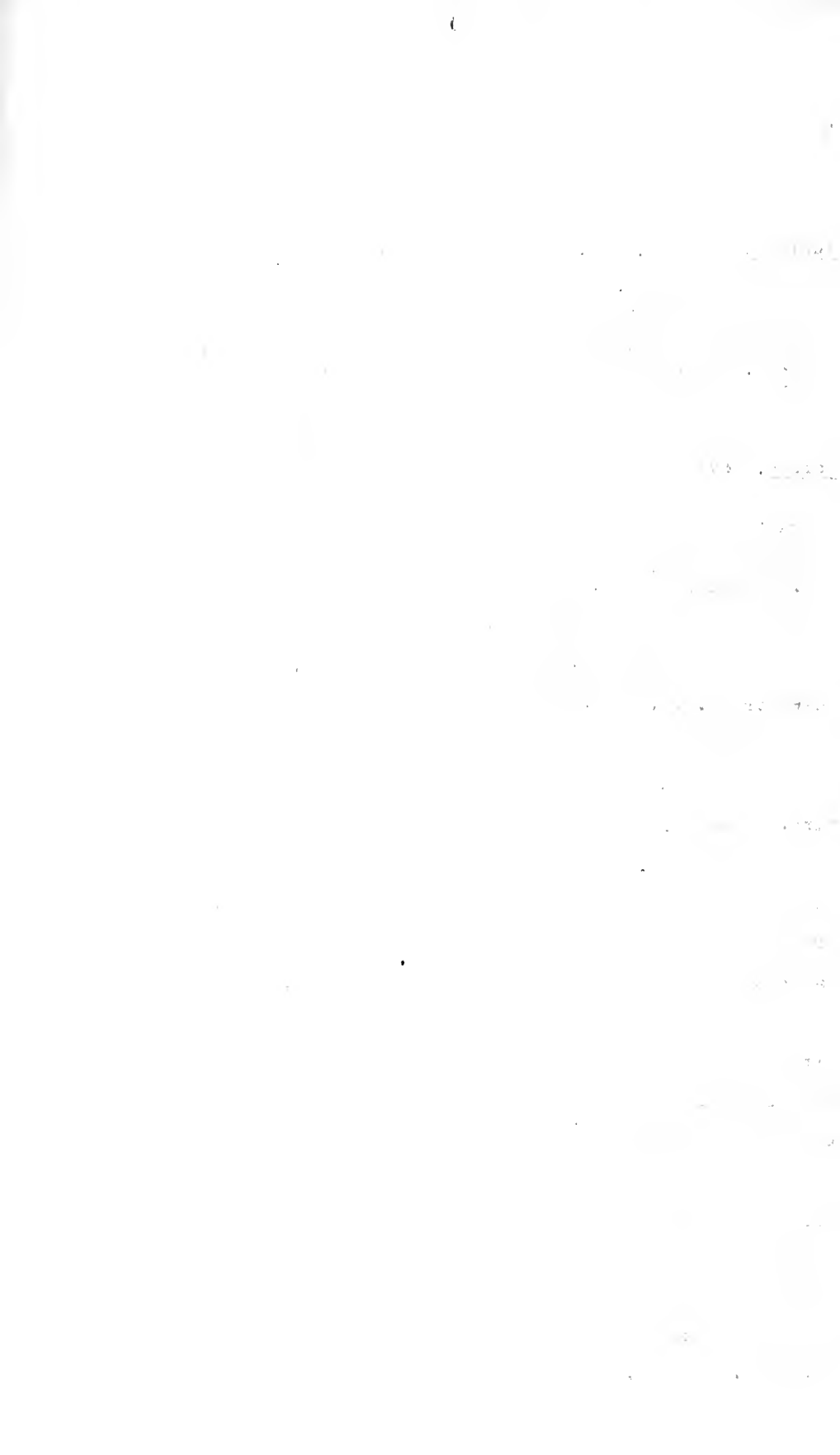
In the case of Prairie State Loan Association v.

Gorrie, 167 Ill. 414, the Supreme Court said:

"It is well known that the members of such associations do, and are practically compelled to, rely upon the secretary for information in regard to their rights as stockholders, and we think the association should be held responsible for his conduct in office. In this case we are of the opinion the court rightly held the association bound by the acts of the secretary."

The evidence does not disclose that complainants knew for several months after they had provided for the payment of their obligation to the defendant that Cerny had embezzled the money which had been intrusted to him for the payment of the first mortgage.

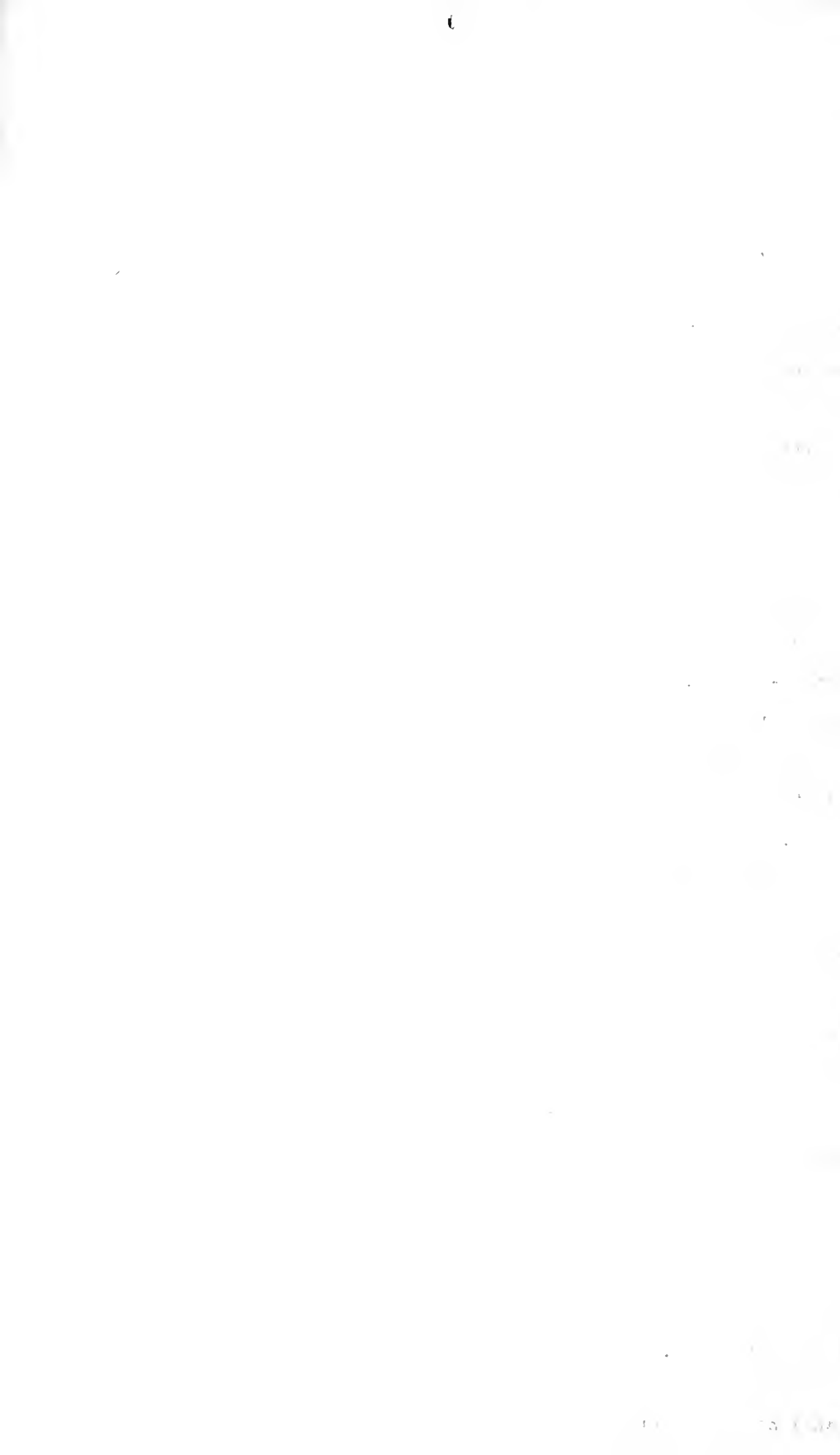
It is quite true that the instant case is different in its facts from the Gorrie and Nubling cases supra, yet aside from the express language of the by-laws and the statutes, the payment of the first mortgage to the secretary, though unmatured, was such a transaction as would ordinarily be regarded as coming within the usual duties of a secretary of a building and loan association. It may be conceded that Cerny acted in part of the transactions referred to as the agent of complainant. It is clear that he did not represent defendant in procuring the loan for complainants which was secured by the execution of the second mortgage. It is our opinion, however, that he received the money paid to him by Pecha as the agent of defendant. He accepted and held this money under an express agreement to pay off the first mortgage, that is, the mortgage securing the indebtedness to de-



defendant, and for this purpose he acted as defendant's agent,

It is asserted that defendant cannot be held to have waived a thirty days notice provision of the by-laws and the statutes, because the evidence in the case does not show that defendant ratified the conduct of its agent, or that it had actually accepted the payment made by complainants to Cerny of their indebtedness to defendant. Defendant's by-laws, so far as shown by the abstract of record, indicate that Cerny alone was authorized to receive moneys on behalf of the defendant. Its treasurer was expressly prohibited from receiving any moneys for defendant except from the secretary. Both the statutes and the by-laws quoted above provide that any member of the defendant association had the right to repay a loan at any time upon giving thirty days notice in writing of an intention to do so; and the question to be determined here is whether defendant's secretary could, on defendant's behalf, waive the giving of this notice. It is our opinion that he could, and that it was not incumbent upon the complainants to show, after payment of the loan to the secretary and its receipt by him with full knowledge of the intent and purpose of the complainants, that the defendant had otherwise ratified his action, or that it had actually received the payment made to its secretary.

The clear meaning of the by-laws and statutes is that a member of a building association such as defendant could repay a loan at any time upon first giving the required thirty days notice. The thirty days notice provision was incorporated in the act and by-laws for the benefit of building and loan associations; it constitutes a limitation on the right of complainants to pay the loan. The defendant, of course, through its proper representative could have refused payment until such time as the legal notice should be given; but it could have waived this



privilege and accepted payment without notice, and in exercising this right of waiver, from the nature of its organization and the character of its business, it seems reasonable to hold that its intention so to do would almost necessarily be expressed by the action of its Secretary, who alone was authorized to receive payments on its behalf.

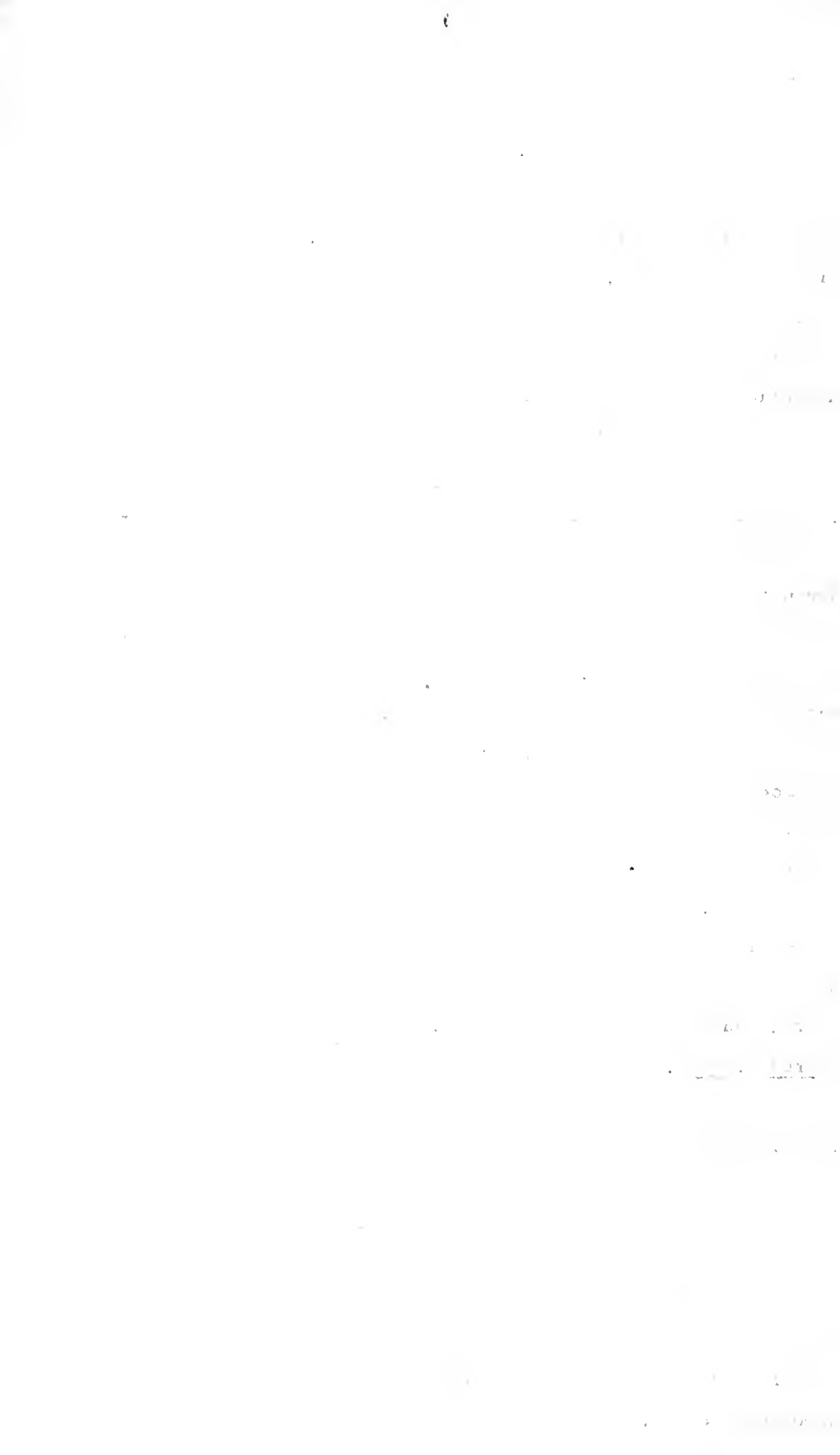
In the case of Columbus Building and Loan Association v. Kriete, 192 Ill. 128, relied upon by the defendant, the Supreme court held that a secretary of a building and loan association not having authority to receive certain payments from its members and such secretary not having been held out by the association as having such authority, and the association not having received any benefit from such payments, it was not estopped to deny its liability therefor. In the present case, however, the evidence is clear that the secretary did have authority and it was his duty to receive the payment made to him by complainants, subject only to the right of the defendant to require, if it saw fit to do so, thirty days notice of the intention to make the payments. The evidence shows that the payment was made to Cerny in the usual course of business and he had both the actual and apparent authority to receive payment on behalf of defendant.

Asperby v. Rowe, 146 Ia. 162.

In the case of Lancaster Building and Loan Association v. Beardley, 72 N. J. E. 714, the court said:

"The money which was paid was not dues, and was not paid by a member on account of dues, but was paid to satisfy a debt due the association. Of course, such payment must be made to some one who is either specifically or impliedly authorized to receive it."

The evidence shows that the complainants acted in good faith throughout the transaction and that they paid defendant the full amount due it. This payment was of necessity made to defendant's agent, who had express authority to receive it; that



he embezzled the money is no fault of complainants, and equitably they ought not to be charged with his dishonesty.

In Vol. 9. Corpus Juris, 939, it is said:

"A prescribed notice of withdrawal is usually required by the by-laws, but such notice need not be in writing unless so required, and even where required the association may waive a written and accept an oral notice, or it may waive any kind of notice."

Schumacher v. Wolf, 125 Ill. App. 81; McKenney v. Diamond State Loan Association, 13 Del. 557.

We are inclined to agree with the contention that neither the statutes nor the by-laws prohibited the defendant, either expressly or impliedly, from entering into an agreement with the complainants through its secretary for a repayment of the loan without giving a thirty days notice of an intention to do so.

It is not material that the payment to Cerny was made at a place other than defendant's office, which was located in the rear of a saloon, and which was used by defendant for its weekly meetings. Prairie State Loan v. Hubling, 17 Ill. 242.

The decree of the Superior court will be reversed and the cause remanded to that court with directions to enter a decree as prayed in the bill.

REVERSED AND REMANDED

WITH INSTRUCTIONS.

Meldom, J. J., concurs and McSurely, J., dissents.

210 - 25982

SHERMAN T. COOPER,
Appellee,

vs.

I. D. ZEMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 644

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against defendant in an action for forcible detainer of premises owned by plaintiff. Judgment was entered against defendant which he seeks to reverse by appeal to this court.

The complaint filed in the cause describes the premises in question as follows: "Apartment on third floor of building known as 4746 Ingleside Ave., Chicago, Ill." It is insisted that this description is so defective as to warrant a reversal of the judgment. The evidence shows that the apartment in question is located on the third floor of a three story building which occupies the single number 4746 Ingleside avenue, Chicago. So far as the abstract of record shows, this objection is made for the first time in this court.

In the case of Haynes et al. v. Sherwin-Williams Co., 126 Ill. App. 414, it was held that an objection to the sufficiency of a complaint in a forcible detainer action should be presented in the form of a motion to quash, and that an objection made after the trial has actually commenced comes too late. This case also held that the description of premises in a complaint in a forcible detainer suit need not be technically correct and that a general description is sufficient if from the complaint the property can be located. The objection to the sufficiency of the complaint comes too late.

It is shown by the abstract of record that on motion of complainant a change of venue was granted in the cause from Honorable Joseph S. LaBuy, one of the Judges of the Municipal court. The order granting the change did not specify what judge the case was to be assigned to. The record shows, however, that the cause was tried before Honorable John A. Swanson, Judge of the Municipal court, before a jury which returned a verdict finding defendant guilty of unlawfully withholding possession of the premises. Here also the objection comes too late. So far as the record discloses, the defendant went to trial before Judge Swanson without objection; and even if it can be said that the order granting the change of venue was defective, the defendant has by its conduct waived any right to any advantage that might otherwise have accrued to him from the error.

It is insisted for the defendant that the plaintiff was not entitled to possession of the premises because it is shown that he had leased them to one E. R. Cole. There is no merit in this contention for the reason that the lease to Cole had been canceled on the morning of the day that the present suit was brought. The lease was canceled not later than nine o'clock on the morning of November 3rd and the present suit was begun about three o'clock of the same day.

Some objection is made to the rulings of the court on the admission of certain evidence. No such error was committed in this particular as would warrant a reversal of the judgment.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Heldom, P. J., and McSurely, J., concur.

WILLIAM G. MUNSON, doing business
as MUNSON CARBON CONSUMER COMPANY,
not incorporated,

Appellant,

vs.

MRS. ANNA STRAUSS, doing business
as FRED STRAUSS DYE WORKS and also
as FRED STRAUSS DYERS & CLEANERS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

219 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover for an alleged breach of a contract entered into between the parties. The contract consists of a written proposition made by plaintiff to install a No. k-36 Munson carbon consumer on a boiler located in premises owned and operated by defendant. The proposal was accepted by defendant on August 16, 1918. The contract did not contain an express warranty that the article sold to defendant would perform any special services or that it was reasonably well adapted to cause a more economical and efficient operation of the boiler. A provision is as follows:

"All previous communications between the purchaser and the company, W. G. Munson, or their representatives, either verbal or written, relative to the subject matter of this specification, and which do not form a part thereof, are hereby abrogated, and this proposal and specification when duly executed constitutes the agreement between the parties hereto, and no modifications of the agreement shall be binding upon the parties hereto or either of them, unless such modifications shall be in writing and signed by the purchaser and the Munson Carbon Consumer Co., Not Inc., W. G. Munson, Proprietor."

It is insisted on behalf of the plaintiff that the contract is in writing; that it is unambiguous and that the full agreement entered into by the parties must be found within its four corners; that the contract is for the purchase of an article under its patented or trade name and that under the Uniform Sales Act no implied warranty can be written into it. The plaintiff

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testified on direct examination that the device in question was patented; that it was delivered to defendant in compliance with the terms of the contract and that she had refused to pay therefor.

The court over objection admitted evidence which tended to show that the device delivered to defendant did not perform services of any value to her, and that in its operation certain damage was done to the boiler.

The evidence introduced for defendant also tends to prove that she knew little or nothing about the operation of the boiler and that she had no knowledge whatsoever of the character of the device in question except as she was informed by plaintiff; that he had on several occasions during a period of about a month solicited her to purchase the device and that the contract in question was the result of his promises and agreements to attach a device to the boiler that would cause it to give more efficient and economical service. On cross examination the plaintiff denied that he had made any representations concerning the device; ^{saying} that he did not tell defendant what the device was for; that a Mr. Baum had informed defendant thereof and that he, plaintiff, merely called upon her to "see the size to be used on the plant and to draw up a contract."

The evidence, if admissible at all, is amply sufficient to warrant the conclusion of the trial Judge that the device in question was unfitted to perform the service for defendant which the plaintiff represented it could and would perform, as testified to by defendant, and we are inclined to hold with the trial court that the preponderance of the evidence was decidedly in her favor. A paragraph of the Uniform Sales Act provides as follows:

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"In case of a contract to sell, or a sale of the specified article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose."

The article in question does not seem to have been sold under the name under which it was patented. The patent describes the device as a new and useful improvement in "Smoke-Flue Dampers for Feeding Air to Combustion-Chambers."

Except the contract in question no evidence was introduced showing that the device had a trade or patent name. The evidence tends to show that defendant did not intend to purchase any particular device by its patented or trade name; that her purpose was to provide for an economical operation of the boiler; that to effect this purpose she applied to the plaintiff and that she acted upon his advice and suggestions.

Prior to the passage of this law quoted above oral evidence was admissible in an action on a written contract for the purpose of showing the relationship of the parties to each other at the time a contract is entered into, so that the court might be placed in a position to construe the contract in the light of that relationship. Our attention has not been directed to any authority which changes the law in this particular.

In the case of New Idea Arc Light Co. v. Rennecker Co., 195 Ill. App. 290, it is said that when a manufacturer sells goods for a specific use there is an implied warranty on his part that they are reasonably fit for such purpose. The evidence tends to show that Mrs. Strauss desired, on the application and insistence of plaintiff, to purchase the device in question and her wishes in this respect seem to have been caused by the specific promises of plaintiff. She, of course, knew that the contract provided for the purchase of a device the operation of which would, she believed,

be profitable to her; but she states shew knew nothing about the principles on which it was to be operated. In other words, we think the evidence discloses that she relied in the making of the contract upon the expert opinion and advice of the plaintiff and that she reposed confidence in his premises.

It is our opinion that aside from the question of an express oral warranty the plaintiff was bound by an implied warranty that the article delivered to plaintiff was reasonably well fitted and adapted for the purpose for which it was intended to be used.

In the case of Craig v. Pellet, 209 Ill. App. 368, the court said:

"The implied warranty is an obligation imposed by law. ***** The general rule, however, is well established by authorities that warranties may be implied when the contract is in writing as well as when it is oral."

As stated, prior to the Uniform Sales Act of 1915 (Callaghan's 1916 St. Supp. 1021 (4) et seq.) where the purchaser of a specified appliance did not rely on the judgment or skill of the seller, but was as familiar with the appliance as the seller, there was no implied warranty by the seller that the appliance was reasonably fit for the purpose for which it was bought. Fuchs & Lang Co. v. Yittredge & Co., 242 Ill. 88.

Section 12 of Chapter 121-A Hurd's Rev. Stat. of Illinois 1917, provides that -

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.***"

Defendant's evidence tends to prove that the defendant was induced to purchase the device by representations made by plaintiff, and under Sec. 12 of chap. 121-A Hurd's Rev. Stat. of Illinois, 1917, above quoted, he became bound by his state-

ments. These representations on the part of plaintiff, unexpressed as they were in the written contract, were properly shown by oral testimony. The cases of Kerslen v. West Coast Roofing Co., 204 Ill. App. 477, and Chicago Warehouse and Silo Fixture Co. v. Highland Planing Mill and Lumber Co., 206 Ill. App. 458, do not aid the contention of plaintiff.

It is elemental that the consideration for an express written promise may be inquired into by parol. The defendant insists that the consideration for her promise to pay for the device in question was the express oral promise and agreement of the plaintiff to install a device which would perform certain specified services for the defendant.

No reversible error was committed by the trial court in giving, refusing to give, or in the modification of certain propositions of law, nor in its rulings on the admission of evidence.

The judgment of the trial court will therefore be affirmed.

AFFIRMED.

Holdom, J. J., and Oeturely, J., concur.

243 - 26015

JOHN MECK, a minor, by
SAMUEL MECK, his father and
next friend,

Appellee,

vs.

JOSEPH WINKEN, Sr.,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the circuit court of Cook County entered in that court in favor of plaintiff for the sum of \$1500.00.

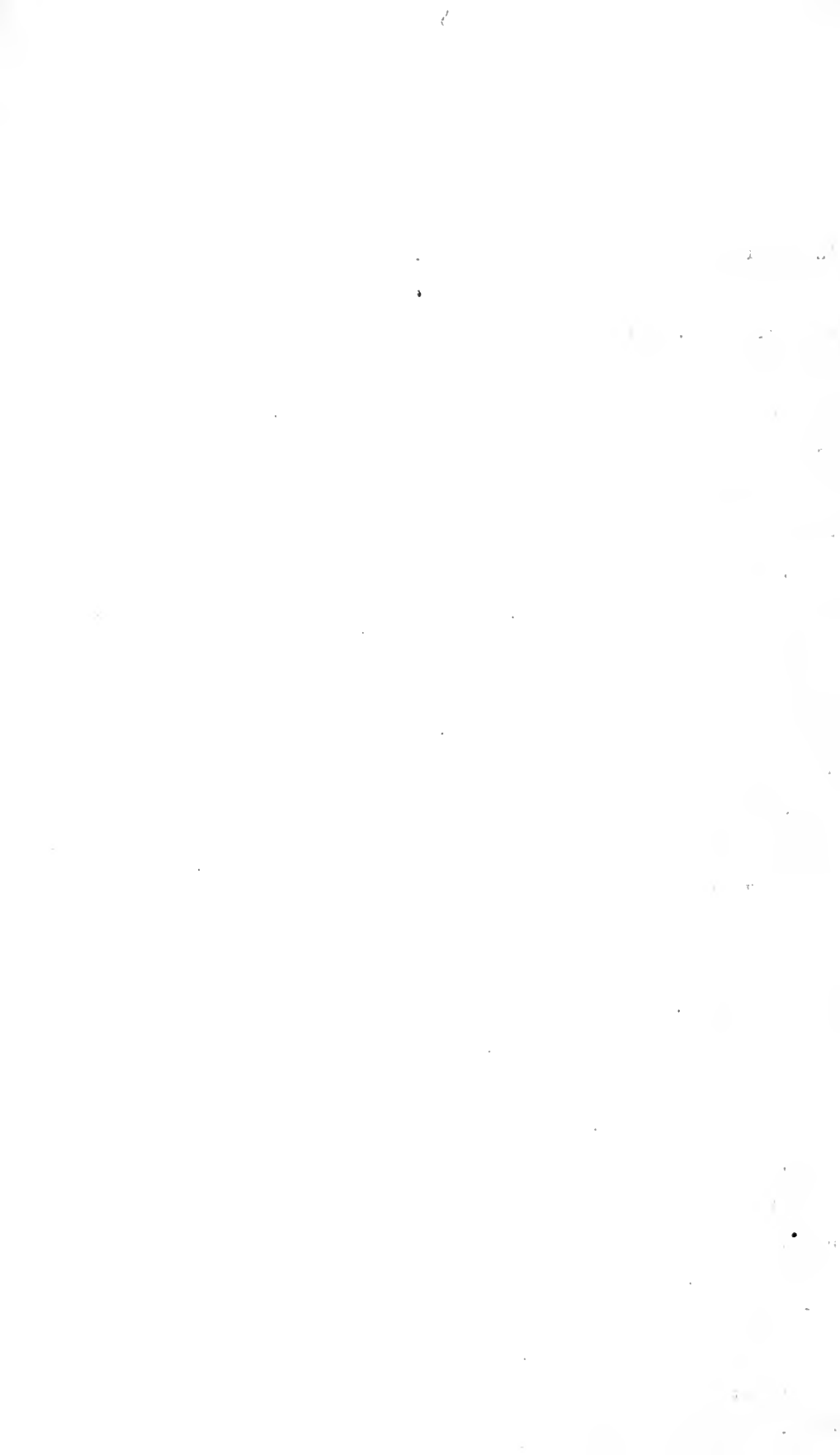
April 2, 1917, the plaintiff, a boy nine years of age, while in the act of crossing North Clark street in an easterly direction at or near the intersection of that highway with Roslyn place, was struck by an automobile truck moving in a northerly direction on North Clark street. North Clark street is a north and south street and Roslyn place extends east and west. The evidence introduced for the plaintiff tends to show that as he attempted to cross North Clark street from its west sidewalk to the south walk on Roslyn place he saw the automobile truck running north on North Clark street when it was a distance of about 125 feet south of him; that the plaintiff attempted to cross the street in front of the approaching truck; that when he reached the car tracks laid down on North Clark street he looked toward the south and saw the truck about 35 or 40 feet away; that he continued his course across the street and was struck by the truck and thereby received injuries.

The evidence introduced also tends to show that the plaintiff attempted to cross North Clark street at a place usually used by pedestrians for that purpose and that the accident occurred

in a thickly populated neighborhood.

It is insisted that the evidence introduced on the trial does not disclose that the defendant was guilty of actionable negligence and that the plaintiff was guilty of negligence which contributed to cause the accident. There is much force in the argument made on behalf of the defendant that if the plaintiff had acted with due caution he would not have attempted to cross the street in front of the approaching truck when, as plaintiff testified, he saw it when it was not more than 35 or 40 feet from him. Two witnesses, Horn and McCauley, employes of a telephone company, were sitting in a repair wagon on the east side of Clark street some distance south of the place where the accident occurred. One of these witnesses said he saw the boy running across North Clark street at a point south of Roslyn place and that he ran into the side of the truck. McCauley also testified that he saw the plaintiff running in a northeasterly direction just before the accident.

On the whole evidence we are inclined to the view that the question of defendant's negligence, as also that of the plaintiff, was a question of fact which was properly left to the determination of the jury. When due consideration is given to the character of the neighborhood where the accident happened, the age of plaintiff, and other circumstances attending the accident, it cannot be said as a matter of law that the driver in charge of the truck was without negligence, or that the plaintiff by his conduct was guilty of negligence which contributed to cause the accident. There does not appear to have been any obstacle in the street which seriously obstructed either the view of plaintiff or the driver of the truck. The truck with its load weighed about six tons, and it was being operated in a thickly settled neighborhood. The jury had sufficient evidence before it to warrant a



finding that the driver, had he exercised the care which was demanded of him in view of the character of the neighborhood where the accident occurred, could have seen the plaintiff in time to prevent the accident. The evidence tends to show that the boy was struck by the west side of the truck. The driver testified that at the time of the accident the truck was moving at about eight miles an hour; other witnesses stated that the speed of the truck was about twelve miles an hour.

It is not enough, under the circumstances attending the accident, to show that the truck was being operated in compliance with public laws regulating the speed of such vehicles. Where heavily loaded trucks are being operated in thickly settled districts, where children and adults are continuously crossing streets, it is required of the drivers of such vehicles to exercise a degree of care commensurate with the danger attending the running of such vehicles at points where persons crossing the streets are in danger of being run down, and, under such circumstances, the operation of a truck even at the rate of ten or twelve miles an hour, may amount to negligence.

In the case of Kessler v. Washburn, 157 Ill. App. 532, the court said:

"Appellee's conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event. If appellee had notice of the approach of the automobile 125 feet away, as appellant claims, this did not necessarily make him guilty of contributory negligence in not avoiding a collision with it, as he had a right to assume that it would approach at a lawful rate of speed and to calculate upon passing in front of it on that assumption. If he made an error of judgment, this would not conclude him on the question of reasonable care, if the automobile was approaching him at an unlawful rate of speed."

As stated in the Kessler case, it was required of the driver of the truck in question to use all the care and caution which an ordinarily prudent driver would have exercised



under the circumstances which existed at and just before the accident happened. And whether he did exercise such prudence was, we think, a question of fact for the jury. The plaintiff was called upon to exercise only such care for his safety as would be required of a boy of his age and intelligence. And even if it can be said that he erroneously believed that he had sufficient time to cross the street in front of the approaching truck without being struck, this fact does not charge him as a matter of law with contributory negligence. Under the circumstances which existed at the time of the accident the law imposed the duty upon the driver of the truck to be mindful of the fact that children, more or less heedless of moving vehicles, were likely to cross the public street, and it was incumbent upon him to exercise reasonable care to have his vehicle under such control as would tend to prevent such an accident as occurred in the present case.

The judgment of the Circuit court will be affirmed.

AFFIRMED.

Holmes, J. J., and McSurely, J., concur.



ABRAHAM ROZOVSKY,
Appellant,

vs.

ARMOUR & COMPANY, a corporation,
FRANKLIN MACVEAGH & COMPANY, a
corporation, and JOHN F. LALLA
COMPANY, a corporation,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff filed his declaration, consisting of four counts, in which he charged that the defendants had committed an unlawful assault upon him and that they had also been guilty of other trespasses against plaintiff's property and business.

Demurrers, general and special, were filed by the defendants to the declaration. On argument these demurrers were sustained and leave was given the plaintiff to file an amended declaration within ten days. On failure to file an amended declaration within the time specified suit was dismissed for want of compliance with the rule, and plaintiff seeks to reverse this order by appeal to this court.

The order sustaining the demurrer and giving leave to amend is as follows:

"It is ordered that said demurrer be and the same is hereby sustained and leave be and the same is hereby given plaintiff to file an amended declaration herein within 10 days from this date."

No exceptions were taken to the order sustaining the demurrers, nor does the record show that the plaintiff elected to stand by his declaration. On the record before us it must be held that the order sustaining the demurrer and giving leave to amend was not an appealable order, and we are not, therefore, permitted to determine the question of the sufficiency of the

declaration filed by the plaintiff. No bill of exceptions appears in the record and advantage can be taken of only such errors as appear on the face of the record.

The only point made by the plaintiff is that the court erred in sustaining the demurrers to the declaration.

In the case of Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, the Supreme court said:

"The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties."

The record before us shows that the order sustaining the demurrers to the declaration was not a final judgment from which an appeal would lie to this court. On its face it did not determine the rights of the parties. The order expressly gave the plaintiff the right to amend his declaration within ten days. He failed to do so within that time and no error was committed by the trial court in its order dismissing the suit.

The judgment of the Circuit court will be affirmed.

AFFIRMED.

Heldom, P. J., and McSurely, J., concur.

298 - 26069

FIRST STATE BANK OF COULTERVILLE,
Appellee,

vs.

BANK OF COMMERCE AND SAVINGS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 645

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered against it in the municipal court of Chicago for the sum of \$2912.50.

A promissory note, which is the basis of this suit, was executed April 12, 1917, by Vernon C. Leftwich, payable to the order of himself and by him endorsed, for the sum of \$2,500 with interest. At the time of the transactions which gave rise to the litigation W. M. Grissom was cashier for the defendant bank, and under its by-laws he had authority "to sign drafts, checks, certificates of deposit and receipts for money delivered, to indorse notes, bill, checks, drafts and acceptances, and to perform all the ordinary business transactions of the bank." At the time the note in question was introduced on the trial it bore in addition to the endorsement of William G. Shedd, Jr., that of the defendant bank by Grissom, its cashier.

The evidence tends to show that J. D. Carlton, cashier of the plaintiff bank, and Grissom had been brought up in the same neighborhood in Johnson County, Illinois. Grissom was a stockholder and director of the plaintiff bank between the dates December 1, 1916, and June 21, 1917, on which latter date the defendant bank became insolvent.

In January, 1917, Grissom in a conversation with Mr. Armstrong, president, and Mr. Carlton, cashier of the plaintiff bank,

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informed them that the defendant bank was overloaned and he asked them if the plaintiff could take \$25,000 of defendant's paper. Grissom was informed that plaintiff would take \$5,000 of this paper if it bore the endorsement of the defendant bank. A few days following this conversation Grissom sent to plaintiff by mail three notes, one of which was executed by Vernon C. Leftwich, the other two being by Wm. G. Shedd, Jr., and John W. Shedd, respectively, each note being for the sum of \$2,500. These notes did not bear defendant's endorsement and they were returned accompanied by a letter from Mr. Armstrong, plaintiff's president, in which he refused to accept the notes unless they bore defendant's endorsement. January 27th the notes were returned duly endorsed by defendant, by Grissom, its cashier. The evidence shows that both credit and charge items were made on account of the transfer of the notes. At the time they were received by plaintiff it had a deposit account with defendant and it thereupon credited defendant's account with the face value of the notes. The defendant bank charged plaintiff with the amount of the notes as of January 18, 1917, the day on which the notes were first sent to plaintiff. The Wm. G. Shedd and Vernon C. Leftwich notes became due in April, 1917, and were sent to defendant for collection; it returned to plaintiff two new notes, one of them, executed by Leftwich, being the note sued on. These latter two notes did not bear defendant's endorsement when delivered to plaintiff; they were returned to defendant, were duly endorsed by it by Grissom, cashier, and re-delivered to plaintiff.

It is insisted for the defendant that it is not liable on the Leftwich note. The evidence shows that neither the note in question nor the other notes involved in the transactions with the plaintiff bank bore certain register numbers and

had not been entered on a discount register kept by defendant in accordance with the regular course of business adopted by it.

The defendant relies in the main upon its assertion that its cashier was personally interested in the transaction by which plaintiff got possession of the note sued on; that he, not defendant, was the owner of the note; that he had no authority or right to endorse the note as defendant's agent, and that plaintiff had, or, under the circumstances, should have had knowledge of the fraud imposed upon defendant. Plaintiff received the notes in the usual course of business from defendant's cashier, who was authorized both by the well known usage and custom of banks and by the express provision of defendant's by-laws to endorse notes and to perform all the ordinary business transactions of the bank.

The case of Merchants' National Bank v. Nicholas & Co., 223 Ill. 41, cited by defendant, does not sustain its position. In that case it was held that a principal may be bound to the extent of the apparent authority he has conferred upon his agent, and it was held that a party dealing with the agent must stand ready to prove the agent's authority; that it was the right and duty of a person dealing with an agent to ascertain the extent of his power and to determine whether his acts were such as to bind his principal. In the present case the authority of the cashier to endorse the notes discounted with the plaintiff was indicated by his office, but aside from that the evidence shows that he was expressly authorized by his principal to transact the business with plaintiff which resulted in the endorsement and transfer of the notes to it. The evidence does disclose, we think, without much question that by manipulation of the notes and records of defendant, Grissom was enabled to overdraw his account

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744 *Journal of Interpersonal Violence* 29(4)

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

with defendant to the extent of about \$7,500. The evidence does not disclose any facts, however, which would charge the plaintiff with knowledge of the fraudulent character of Grissom's conduct. The notes in question did not when transferred bear what J. D. Carlton called a discount number when they were received by him. A witness acquainted with banking customs in answer to a hypothetical question, stated that the circumstances under which plaintiff received the notes were a little unusual and that he would not accept a loan under such circumstances. These circumstances might have caused some suspicion that the conduct of Grissom was irregular or negligent, but they were not at all sufficient to create a belief in the mind of Carlton or other officers of plaintiff's bank that he was acting fraudulently and that he and not his principal was the person actually interested. Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity for value and without knowledge of any defense thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper will not defeat his title. (Bradwell v. Pryor, 221 Ill. App. 602); Kavanagh v. Bank of America, 239 Ill. 408.

In the case of Kuolt v. Canright, 202 Ill. App. 502, 506, it is said that -

"The curiosity of an inquisitive person might have been aroused by these letters, but it is certain that neither actual knowledge of the defeat, nor knowledge of such facts as to make the discounting of a note bad faith are shown. Neither the knowledge of suspicious circumstances or even gross negligence will affect the title of an assignee in the absence of bad faith."

Page v. Hallam, 212 Ill. App. 462 - 468.

That the plaintiff or its officers had no actual knowledge of Grissom's conduct is almost certain. One of plaintiff's officers had been acquainted with Grissom since their

childhood. Grissom and his principal had frequently transacted business with plaintiff and there was nothing shown by the evidence that would cause plaintiff or its officers to suspect that Grissom was not acting in perfect good faith. Plaintiff in no way profited by Grissom's fraudulent conduct and it is perfectly clear that its officers would not consciously have become parties to his fraudulent acts when by so doing, without prospective profit, they would have risked \$7,500 of plaintiff's money. We cannot discover from the evidence before us facts sufficiently strong to charge plaintiff's officers with notice of Grissom's conduct. The fact that the notes did not bear a register number and that in the first instance they had been delivered to plaintiff without defendant's endorsement, were not, in our opinion, sufficient to give notice that Grissom was dealing for himself and not for his principal; nor did the fact that he was a stockholder and director of plaintiff's bank serve to give them any warning that he might violate his trust toward defendant.

In the transactions in question Grissom was acting within the scope of his authority as cashier of the defendant bank, and in the absence of notice, actual or constructive, to the plaintiff or its authorized agents of his lack of authority to endorse the note, the defendant bank became bound by his act.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Heldom, F. J., and McSurely, J., concur.

328 - 26100

JOHN G. COON,
Appellee.

vs.

THEODORE H. SCHINTZ,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 646

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by Theodore H. Schintz, defendant, from a judgment of the Municipal court of Chicago in a forcible detainer action brought against him by the plaintiff, John G. Coon.

The owner of the premises the right to possession of which is in dispute between the parties, is Daniel M. Rothschild, who executed a lease therefor to the plaintiff for the term from October 1, 1919, to September 30, 1920. At the close of all the evidence the court, upon motion of the plaintiff, directed a verdict in his favor. The verdict was entered as directed, judgment was entered thereon and the defendant seeks by this appeal to reverse the judgment.

Defendant was in possession of the premises under a written lease which expired September 30, 1919, and he insists that he entered into an oral agreement with Whiteside & Wentworth, the owner's agents, for an extension of his right to the possession of the premises until May 1, 1920, at an increased monthly rental. Mr. Rothschild, the owner of the premises, testified that Whiteside & Wentworth acted as his agents in the handling of the building and that a Mr. Danz of that firm was his duly authorized agent. Mr. Rothschild, however, testified that his agents had authority to make only written leases for the premises in question, and his

testimony in this particular is not directly denied by any evidence offered or received on behalf of the defendant.

The defendant testified that in the course of a conversation with Mr. Rothschild in which defendant said that the agents had agreed to an extension of his, defendant's, lease until May 1, 1920, Mr. Rothschild said he did not see any reason why an old tenant should be dispossessed for a new tenant. This statement, if true, does not amount to a ratification of the unauthorized act of the agents.

It may be conceded that the question of whether the agents had entered into an oral agreement with defendant was a question of fact for the determination of the jury, but as to the matter of the authorization of the agents to make such oral agreement, we think the evidence is undisputed that they had no such authority and that the owner had not either expressly or impliedly ratified the alleged oral agreement.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

$$f_{\text{eff}} = \frac{1}{2} \left(\frac{1}{f_1} + \frac{1}{f_2} \right) \quad (1)$$

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245 - 25122

FELIX J. HEDTUN,
Appellee,

vs.

JOSEPH T. RYERSON & SON,
a corporation,
Appellant.

SUPREME COURT
OF CLACK COUNTY.

219 I.A. 646

MR. JUSTICE MCGUFFEY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal asks for the reversal of a judgment against it of \$12,500 in an action to recover compensation for personal injuries, tried by a jury and the court. The case has been twice tried; the first time there was a verdict of not guilty. We regret that the present judgment must be reversed and the cause remanded for a third trial.

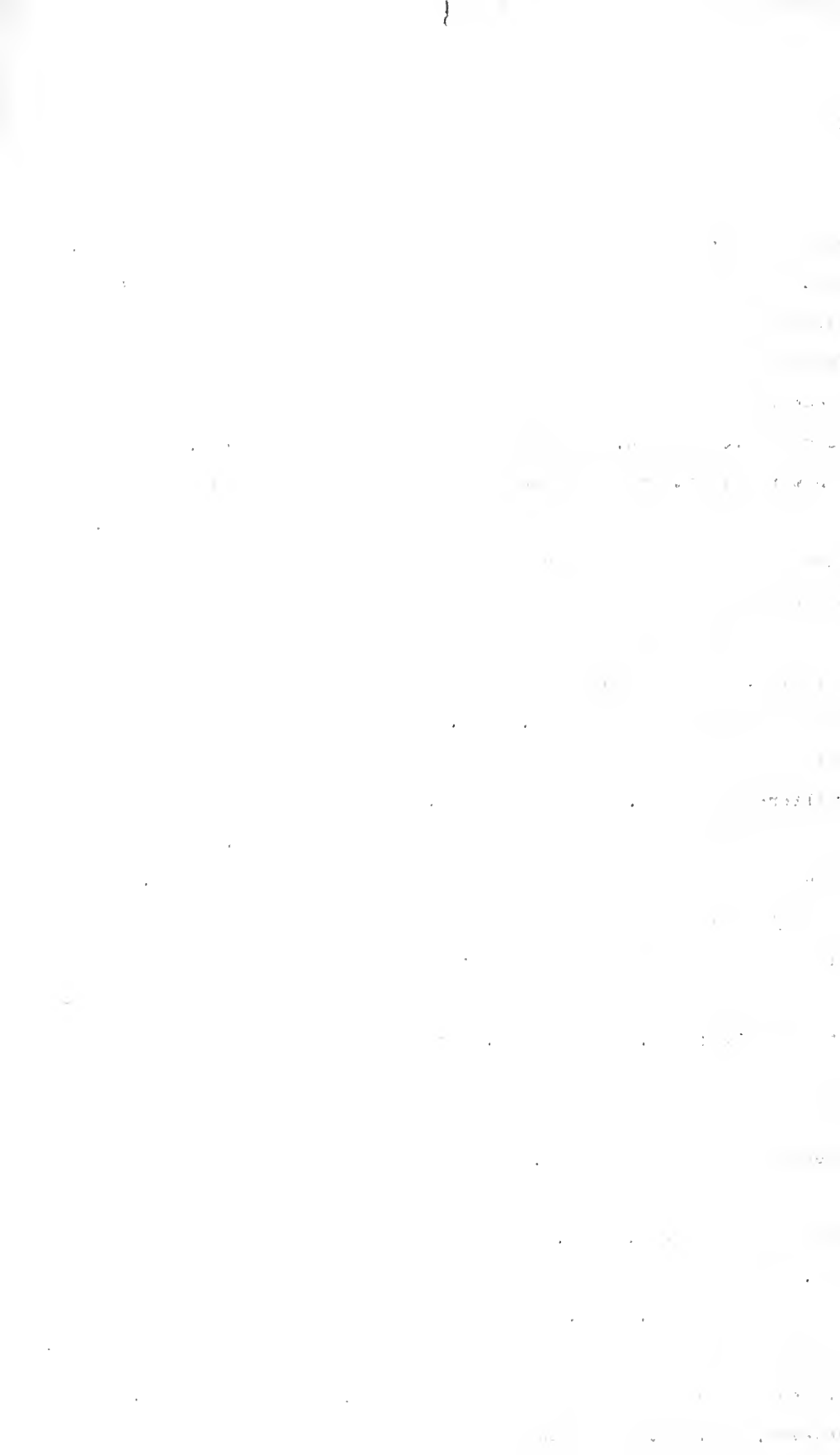
Plaintiff was foreman for the Cykes Steel Roofing Company which had a contract with the firm of Hutter & Lett to cover the roof and siding of the shop of defendant with glass and corrugated iron. While working on the siding on the inside of the shop plaintiff placed his head on the track of a crane operated by defendant and a crane ran over it inflicting the injuries in question.

Two cranes used this track, which was alongside of and near the place where plaintiff and his men were working. Plaintiff presented evidence tending to show there was an agreement between the concern doing this work and the representatives of defendant that whenever a crane was about to pass the place where the men were working it would stop and not proceed until it had warned these workmen so that they might remove from danger.

After a new trial had been granted in the first trial the case was dismissed for want of prosecution but reinstated by stipulation. Upon motion of plaintiff a change of venue

was taken from the trial Judge to whom the case then was assigned. In the fall of 1918 plaintiff moved to advance the case on the calendar and set it down for a new trial and at the same time defendant made a motion for a continuance on the ground of the absence from the state of three witnesses for the defense. These were Edward Ryerson, Charles Valliere and Harry Mintier. These men were all at that time in the service of the United States government and it was impossible to have them present in person. They were expected to give testimony tending to negative the agreement above referred to with reference to stopping the cranes before passing the place where the men were working inside the building. The motion to continue was not passed upon until the case was reached December 9, 1918, when the motion was renewed. This was resisted upon the ground that the deposition of Mr. Valliere was taken, that Ryerson had testified on the former trial and plaintiff had an unsigned statement from Mintier. It is argued with force that as this alleged agreement was verbal, defendant could not anticipate just exactly the form in which plaintiff would present such conversation and therefore could not adequately anticipate what would be sworn to in this respect on behalf of plaintiff; and, furthermore, because of the peculiar character of this testimony it was almost a necessity to make a proper defense that these witnesses should be present on the stand to be seen and heard by the jury.

At the time the motion was first made for a continuance, that is in October, 1918, we were still in the midst of the great war, but when it was renewed at the time the case was called for trial in December, 1918, the armistice had been signed and there was a reasonable prospect that the personal attendance of these witnesses could be had within a short time. The trial court, however, denied the motion for continuance and proceeded with the



trial. We are of the opinion such denial was erroneous. In Miles v. Danforth, 32 Ill. 59, it was held that it is ground for continuance that a material absent witness is a soldier on active campaign. Among other cases holding that a similar motion for continuance should have been allowed are: Adams v. Colton, 2 Scammon 71; Corbin v. The People, 131 Ill. 616; Kellyville Coal Co. v. Hill, 95 Ill. App. 660. Admission that the absent witness would testify as stated in the affidavit is not always the equivalent in probative force to his testimony given on the stand. The appearance of a witness and his manner of testifying usually supply just the element of personality which enables a jury properly to weigh contradictory statements. We approve of what was said in Hopkinson v. Jones, 28 Ill. App. 409:

"It sometimes occurs that the relations of the absent witness to the party desiring his evidence and attendance is such that his personal presence is as important to aid in the conduct of the trial as his evidence upon the issue involved. And when such personal presence of the witness is fairly shown to the court by proper affidavit to be reasonably and probably necessary to a fair trial and to prevent surprises, then, and in such cases the motion ought not to be overruled because the party may admit the affidavit."

We hold that the motion to continue was presented in apt time; that the supporting affidavit sufficiently complied with the statute and under the circumstances of the case the motion for continuance should not have been overruled.

Objection is made to the admission of statements with reference to stopping the crane twenty feet from the workmen and ringing a bell. Mintier, to whom such statements are attributed, was not an agent of defendant and therefore any agreement by him would not bind the defendant. We are inclined to think they are admissible under the charge of general negligence and particularly under the count of failure to give plaintiff warning.

Valid criticism is made of the first instruction given

at plaintiff's request. It was entirely too long and we do not see how it could have been of any assistance to the jury.

Other points are made which should not receive comment from us at this time as the case must be remanded for a new trial. For the error in refusing defendant's motion for continuance the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Holden, I. J., and Dever, J., concur.

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CHAPMAN & SMITH COMPANY,
a corporation,
Plaintiff in Error,

vs.

CHICAGO BONDING & SURETY CO.,
a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COCK COUNTY.

219 I.A. 646

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in debt on an Employee's Fidelity Bond issued by defendant, seeking to recover \$2641.43, but the trial court directed a verdict for \$381.78 and judgment was entered for this amount. Plaintiff appeals, claiming it was entitled to the larger amount.

The bond in question was dated December 30, 1913, and by its terms defendant agreed to pay any pecuniary loss, not exceeding \$10,000, which the plaintiff, an employer, might sustain, of money or other personal property by any act of personal dishonesty, theft, embezzlement, etc., by Louis F. Weiss, an employee, while in the employer's service. Under date of December 24, 1913, defendant sent to plaintiff a letter stating that Weiss had applied to defendant company for a fidelity bond and that as the issuance of such bond would depend upon information furnished by plaintiff, the latter was requested to answer the questions in an accompanying paper. These questions were answered, and among other items of information plaintiff stated therein that its books, accounts, stocks and securities would be inspected, audited and verified with funds on hand or in bank, "at least once every month."

December 10, 1914, as the first year of the bond was nearing a close, defendant issued a notice of expiration to plaintiff, and on receipt thereof and as a consideration for the continuance of the bond plaintiff sent defendant the necessary premium

for the ensuing year and also the following letter:

"To Chicago Bonding and Surety Company,
Chicago:

THIS IS TO CERTIFY, That since the issuance of the above bond Mr. Weiss has faithfully, honestly and punctually accounted to me for all money and property in his control or custody as my employee; has always had proper securities and funds on hand to balance his accounts, and is not now in default to me.

Signed,

CHAPMAN & SMITH COMPANY,
B. B. Crennell,
Treas. & Gen'l Mgr.

Dated Dec. 11, 1914, at Chicago, Ill."

Thereupon the bond was continued in force.

The evidence discloses that the employee, Weiss, had embezzled \$381.78 in August, 1914, and the balance of his thefts occurred after the policy had been renewed as above stated. The position of the defendant was willingness to pay the amount taken during the first year, but disclaiming liability for thefts occurring after the renewal upon the ground that the renewal was obtained by reason of the representation of plaintiff that Weiss had theretofore faithfully and honestly accounted for all moneys in his control, etc., which representation was untrue. The trial court was in accord with this view and directed a verdict accordingly.

The question involved has been recently before this court and determined. Whyland v. Chicago Bonding and Security Co., 209 Ill. App. 485, and Auto Truck Steel Body Co. v. Chicago Bonding and Insurance Co., 25174, opinion filed April 30, 1920. The opinions and decisions in these cases are conclusive on the point before us. They both support the position of the plaintiff here and the judgment of the trial court. Mr. Justice Gridley in the latter case has comprehensively investigated and stated the decisions in point, and we refer to what is there said as well as to the opinion in the Whyland case as to reasons for our conclusion. Wilce Co.

v. Royal Indemnity Co., 289 Ill. 383, is also decisive, where the court said of a similar point:

"The statements made by appellant were untrue. Obviously, the information contained in the statements was of vital importance in inducing appellee to execute the bond. Some of the statements must have been known by appellant to be untrue and as to others, whether known by appellant to be untrue or not, it assumed knowledge of the facts and can not now allege want of knowledge. (Hartford Life and Annuity Ins. Co. v. Gray, 91 Ill. 159.)

Plaintiff argues extensively in detail attempting to show that Weiss's method of embezzlement was skilfully concealed. However, it appears clearly that a proper monthly checking up of the cash would have disclosed a loss, and as said in the Wilce case, supra, the plaintiff "assumed knowledge of the facts and cannot now allege want of knowledge."

We do not think the record supports the claim that defendant changed its hold after suit was brought and now defends on different grounds. The letter refusing payment of the entire amount claimed is consistent with its position upon the trial.

What we have above stated disposes of other points made in the brief, and for the reasons above indicated the judgment is affirmed.

AFFIRMED.

Holdom, F. J., and Bever, J., concur.

175 - 25947

NETTIE MYSIK,
Appellee.

vs.

SOLOMON STEINMAN et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 I.A. 646

MR. JUSTICE McSHUREY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover compensation for personal injuries alleged to have been inflicted by defendant's automobile, had judgment for \$750, from which defendant appeals. The declaration was originally in five counts, but subsequently all except the first count were eliminated. This alleged general negligent operation of the automobile and was sufficient to state a cause of action. Chicago City Railway Co. v. Jennings, 157 Ill. 274; Chicago City Railway Co. v. Fural, 224 Ill. 324. Criticism of the inartificial character of the declaration is not important, as all intendments favor the declaration after verdict. Buck v. Citizens C. M. Co., 254 Ill. 198; Humason v. Michigan Central R. R. Co., 259 Ill. 462. Insufficiency in form of a declaration cannot be presented after verdict. Illinois Steel Co. v. Stonevick, 199 Ill. 122.

While there is some dispute as to the facts of the occurrence, the jury properly could believe that on the evening in question, September 13, 1916, plaintiff had alighted from a southbound street car running on Ashland avenue, in Chicago, in the west track, which stopped at the north crossing at Erie street, which runs east and west; that she passed to the rear of the car, crossing the southbound track and into the space between the southbound track and the northbound track and then observed the automobile of the defendant moving in a northerly direction about

forty feet away, running with one wheel east of the east rail of the northbound track and going at the rate of twenty-five or thirty miles an hour; that she waited for it to pass when, as it appeared to her, it suddenly swerved from its straight course over to the left and in a westerly direction, striking plaintiff and injuring her. Under these circumstances the jury rightly could conclude that the accident was caused by the negligent operation of the automobile both with respect to speed and its sudden change of direction towards plaintiff, and also that at this time plaintiff was exercising due and proper caution for her safety.

It is strenuously argued that the driver of the automobile at this time was not driving it as an agent of the defendant but solely upon an errand personal to himself. The evidence presented on this point was that the car was driven by one Trock, an employe of the defendant; that he was accustomed to using and driving the car, having driven it five or six times before this; that defendant is a member of the firm of Steinman Brothers, a copartnership, and that upon the evening in question a manufacturer by the name of Friedman had been interviewing this concern upon some business; that when he left them Trock undertook to carry Friedman and also a Mr. Turbin, who had business relations with defendant's concern, down town and then to return with the car to defendant, who was waiting for the automobile at his place of business. The accident happened on the return trip. We cannot say that the jury was not justified in believing that this trip was not a personal one by Trock, but was made as the agent for defendant and for the purpose of conveying these two men who had business relations with the defendant's firm.

The ownership of the automobile was denied by special plea. There is in evidence an admission by the defendant of ownership and also a statement as to Trock being a good chauffeur. The credibility of the witness testifying to this admission is strongly attacked, but we cannot say the jury should not have believed it.

It is said that certain letters which admitted ownership and control of the automobile were improperly admitted in evidence because their authorship was not shown. The attorney for plaintiff wrote to the firm to which defendant belongs, advising them of this accident and suggesting settlement. This letter was properly stamped and mailed. In due time the attorney received back through the United States mail his letter, with a communication referring to his letter written upon the lower part of the letter sheet. This was signed by the firm name. This was sufficient to raise a presumption that it was written and sent by defendant's firm and it was proper for the jury to consider it. It was also proper to present to the jury the other letter which purported to have been written and signed by Steinman Bros., for it refers to a previous letter and to the subject matter under consideration.

Plaintiff received contusions on her body generally and suffered much pain and was prevented from attending to her work for some time. We cannot say that the award of \$750 was excessive.

This court should not overrule the verdict of the jury unless such verdict is manifestly against the greater weight of the evidence. As we cannot say this in the present case and as no reversible errors occurred upon the trial, the judgment is affirmed.

AFFIRMED.

Holdom, P. J., and Dever, J., concur.

184 - 25956

JOSEPHINE BENNETT SEBREE,
Appellee,

vs.

JOSEPH J. DAVIS,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2191 A. 646

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$2691.14 against him in an action of trespass on the case.

Plaintiff's declaration alleged that on or about September 24, 1913, she placed with defendant for safe keeping \$2200 in money upon the promise that he would keep the same for her until she requested its return; that he afterwards returned to plaintiff \$50 and no more; that on or about October 15, 1914, she demanded from defendant the return of the balance of said money; that he refused to return the same or any part thereof, but wrongfully and unlawfully kept and converted the same to his own use. Defendant filed a plea of not guilty and two special pleas, but no evidence was presented to support the special pleas. The verdict of the jury was for the plaintiff in the sum of \$2691.14, of which \$541.14 represents interest.

Plaintiff's story substantially was that defendant had been the physician for J. E. Sebree, her husband, for a number of years and she had known him for ten years prior to the occasion in question; that for ten weeks prior thereto she had been under defendant's treatment for dental work; that she was in a very nervous condition and confined to her bed; that her husband was ill and had been for several months; that Roy, Mr. Sebree's son by a former marriage, was about the house considerably during this time, and that she feared he might take some of

her money and jewelry; that upon the occasion of one of the defendant's professional visits to her in September, 1913, at her home, she informed him Roy had been drinking and she wished the defendant to take her money, amounting to \$2200, and keep it for her and also her diamonds and her revolver; that defendant refused to take the diamonds but agreed to take the other things; thereupon she delivered to him currency amounting to \$2200 to be kept by defendant for her; that this was in the presence of her maid, Elizabeth McCabe; that defendant took it and said he would keep it for her; she thereupon asked defendant if he would not put this in writing and defendant went to a desk in the room and at plaintiff's dictation wrote the following:

"If anything should happen to me hand the enclosed \$2200 to Mr. J. K. Seabee, as I don't wish my relatives to have it."

that plaintiff then signed her name, "Mrs. J. . Seabee," under the writing, whereupon defendant took the writing and rolled it up with the currency and placed it in his pocket, saying in substance that he would take it and put it in his safety deposit vault and in a day or so when plaintiff was able to go downtown he would get a box for her and put the money away. The testimony of the maid corroborates this story.

That defendant received some money upon this occasion is not disputed; the contention is as to the amount. He claimed he received only \$100 and that he returned this to plaintiff in two payments shortly after the death of J. K. Seabee, which occurred on November 17, 1913.

The testimony of plaintiff is vigorously attacked and alleged inconsistencies and contradictions are marshalled in order to discredit her story. To note these would make this opinion entirely too long. Such discrepancies do not necessarily prove the untruthfulness of the essential points in her testimony.

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It is axiomatic that great smoothness in a narrative may be one of the marks of its fabrication. The jury could properly be of the opinion that the discrepancies were no more than the normal uncertainties as to attending details of the occurrence, and which were indices of the truth of the vital point of the story.

Testimony tending to show mental derangement of the plaintiff at the time of this occurrence was given by several witnesses. It was said she was suffering from insane delusions and from alcoholism. It was conceded that some two months or more after the delivery of the money to defendant plaintiff was committed to the insane asylum at Kankakee. The petition for the inquest into her sanity was signed by defendant. She went to Kankakee December 17, 1913, and returned to Chicago June 22, 1914, and was officially discharged as recovered September 24, 1914. The jury might well have thought that these adverse witnesses were biased and hostile to the plaintiff. One of such witnesses was the Roy Sebree above referred to, between whom and the plaintiff there existed mutual distrust. He seems to have been a factor in instigating the inquest of lunacy. He paid defendant \$100 for his services in this matter. His testimony indicates violent antagonism to plaintiff. It was peculiarly the province of the jury to weigh all such matters and it could properly come to the conclusion that while plaintiff may have suffered in some respects from impaired mental faculties, yet she was worthy of belief on the crucial fact as to the amount of money she gave to defendant.

Defendant also argues that plaintiff's story is disproved by writings signed by her. Reference is made to a paper purporting to have been signed by plaintiff at the time defendant returned her \$50, which paper purports to read that December 4, 1913, plaintiff received of Dr. Davis \$50 "on account of \$100." The body of this receipt is in defendant's own writing and the

signature by plaintiff thereto is not denied. It was argued to the jury, with considerable basis in the document itself, that the words "of \$100" were inserted in the receipt after it had been signed by plaintiff.

Defendant also produced a written paper which he claimed was (but which was denied by plaintiff to be) the original writing or receipt executed by defendant at the time he received the money from plaintiff, which read that the defendant had received \$100 for safe keeping. Inspection of the photographic copy in the record discloses considerable reason for the claim that an erasure is shown at the place where the figures \$100 appear and also that these figures beginning the second line of the writing are indented farther than the first or third lines. From the physical appearance of this document we cannot say that the jury should not have been of the opinion that the amount originally written therein had been erased and the figures \$100 inserted instead. There is also force in the suggestion that when the demand was made upon defendant for the balance of her money in accordance with plaintiff's version as to the amount, defendant did not meet this by producing this paper purporting to be his receipt for \$100.

There is nothing important involved in the manner of the demand made by plaintiff upon defendant for the return of her money; it was first made orally; she then made a final written demand and the original was left with defendant. Upon the trial he was unable to produce this, but did produce what purported to be a typewritten copy of it showing a demand for only \$2100.

This court has repeatedly said that we will not set aside a verdict of a jury unless it is clearly and manifestly against the weight of the evidence. Simmons v. Commonwealth Edison Co., 203 Ill. App. 367; Stone v. Denk Bros., 199 Ill. App. 64, and a

large number of other cases. It is especially like what was said by Mr. Justice Walker in Bishop v. Fosse, 69 Ill. 433:

"The appellate court neither sees nor hears the witnesses testify, and only sees the evidence on paper, where it all appears alike. The evidence of a witness whom no one, seeing and hearing testify on the stand, would believe, when his evidence is reduced to writing may appear as consistent and truthful as that of a witness of the most undoubted truth and integrity. From these considerations it is apparent that we should be cautious in the exercise of the power, conferred upon us by the statute, to reverse because the finding is not supported by the testimony.

In all such cases the presumption is, that the jury have done their duty and found correctly; that the judge trying the case, and being in a position to determine accurately whether the finding is right, and acting under the responsibility of his place, has determined correctly in overruling the motion for a new trial. These presumptions being in favor of the finding, we always feel reluctant in interfering. Nor can we adopt a rule that mere numbers of witnesses should determine the question. All know that there are some witnesses who testify consistently, yet there is that in their manner which impairs the force, if it does not wholly destroy their testimony. Of these things we can not judge, because we do not have the means.

*****The jury judge of the manner and appearance of witnesses on the stand, their surroundings, their interest, their prejudice and feelings manifested in the case, none of which do we see. We must, therefore, leave the question of credibility and the worth of evidence where the law has placed it, with the jury, and decline to disturb the finding in this case."

And in American Express Co. v. Stuart, 134 Ill. 390,

it was said that this court should not reverse unless the verdict was clearly and manifestly against the evidence, even "if sitting as jurors we might have reached a different conclusion than that of the jury." In Butler v. Whiteman, 196 Ill. App. 320, the words, "clearly and manifestly" were emphasized in their application to the weight of the evidence. These propositions have been many times repeated in a large number of cases in this state. Giving careful consideration to the record and the arguments of counsel, we are unable to say that the credence given by the jury to plaintiff's statement as to the amount of money she delivered to defendant was improper as being clearly and manifestly against the weight of the evidence, and we therefore have no reason in law to reverse upon the facts.

There was no reversible error in the rulings of the court upon the evidence touching the mental condition of plaintiff. She was not adjudged insane until some time after the occurrence in question, and must in law be presumed to be sane until adjudged otherwise. Titcomb v. Vantyle, 84 Ill. 371; C. W. D. Ry. Co. v. Mills, 91 Ill. 39, and in civil actions one alleging insanity has the burden of establishing it. Austin v. Austin, 260 Ill. 299. Even the insanity of a witness does not necessarily entirely destroy the value of the weight of his testimony, and the jury was properly instructed that it should consider the insanity as determining the value of plaintiff's testimony. It was for the jury to determine what credit should be given to the testimony under the circumstances; Kelly v. People, 29 Ill. 287; and a person so mentally deranged that a conservator has to be appointed is not incompetent as a witness, but his testimony is to be weighed by the jury under the usual tests. Champion v. McCarthy, 228 Ill. 87; People v. Enright, 256 Ill. 221.

There was no error in ruling against the hypothetical question submitted to Dr. H. I. Davis. It includes what the witness saw or learned three months subsequent to the date of the occurrence and which was not testified to. It contained elements having no basis in the record and did not call for a conclusion to a reasonable degree of certainty.

Complaint is made that plaintiff was permitted in the presence of the jury to sign her name for the purpose of permitting the jury to compare this signature with other writings. The cases holding this objectionable arose before the enactment of the statute of 1915, chap. 51, sec. 52, which provides that handwriting may be proved by comparison by the witness or by the jury with writings "proved to be genuine to the satisfaction of the court." The signature was evidently proved to be genuine to the satisfaction of the trial court and was under the statute admissible. Such signatures

are not necessarily incompetent when made post litem motam.

It is argued that the plaintiff having signed the receipt for fifty dollars on account cannot be allowed to question it, and especially the words claimed to have been subsequently added. The documents which were questioned were submitted to the jury and it was for them to determine whether or not there had been alteration. As was said in Hayes v. Sagner, 220 Ill. 256, "The question whether there has been an alteration in a contract and the intent with which it has been made are questions for the jury to determine from all the circumstances."

Other points and alleged errors upon the trial are not of a nature to require a reversal. Upon the entire record no sufficient reason has been presented requiring a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Heldom, T. J., and Dever, J., concur.

198 - 25970.

JOSEPH McCARTHY,
Appellee,

vs.

ELEANOR H. B. MEYERS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2191.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant has appealed from a judgment said to be for \$1893 entered against him in a suit tried by the court to recover compensation for certain improvements made by plaintiff for defendant on a hotel building in Chicago.

This judgment should be affirmed because we are not informed by the abstract as to the statement of claim, affidavit of defense or the judgment. No attempt is made to abstract the statutory or common law record. The failure of the abstract to present the issues or the judgment has been repeatedly held sufficient grounds for affirmance. Bishop v. Loewus, 63 Ill. App. 351; Deane v. Michigan Stove Co., 69 Ill. App. 106; Elia v. Societa M. S. di P. C., 203 Ill. App. 278. The Appellate court will not examine the transcript of the record to search for grounds for reversal. Love v. Dick, 177 Ill. App. 98; Kieszkowski v. Bostrom, 179 Ill. App. 73.

There is also basis for the claim of counsel for plaintiff that the abstract is entirely incomplete; many pages of the record and exhibits being omitted.

We gather from the argument that the case hinged upon the identification of the final contract between the parties. While we are not obligated to do so, we have examined the record sufficiently to be of the opinion that the trial court was right in finding that the contract testified to by the plaintiff was

the real contract.

The secondary evidence as to the contract was properly admitted, as the defendant, who had possession of the original, admitted that it was either lost or destroyed.

There is some suggestion made as to lack of evidence of performance. We think it sufficiently appears that all of the work called for by the contract was properly performed except the installation of four lavatories, and that plaintiff was justified in refusing to install these because of the failure of defendant to make payment within the time provided by the contract. Defendant was repeatedly requested to make payment as had been agreed upon, but refused to do so, and plaintiff was not required in face of such refusal to put more money, time and material into the building.

The finding of the court made due allowance for the four lavatories not installed, and if there were any errors in the computation, as claimed, such errors are not pointed out.

For reason of the faulty abstract and upon the merits, the judgment is affirmed.

AFFIRMED.

Holdom, F. J., and Dever, J., concur.

219 - 25991

MELLIE HUYLER,
Appellee.

vs.

MARGARET A. MARTIN, doing
business as Martin Auto Livery,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 L.A. 647

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit, alleging that she was injured while a passenger for hire in an automobile or taxi cab operated by defendant. Upon trial she had a verdict and judgment for \$500. Defendant argues here for reversal on the ground of non-liability and prejudicial errors during trial.

Defendant operates an auto livery business. Upon the day of the accident, January 26, 1918, plaintiff telephoned to defendant's place of business and ordered a taxi cab sent to her place of employment. She testified that the reply was the cab would be there at the hour named, at which time the taxi called for her, the chauffeur announcing his arrival by saying, "Martin Auto Livery;" that she told him where she wanted to go and got into the taxi cab, which during the journey ran into a snowdrift, stopping the vehicle suddenly and throwing plaintiff from the seat; that the chauffeur, instead of going down another street where there was less snow, drove again into the snowdrift and she was again thrown from the seat, striking her left shoulder against the window casing. Arriving at her destination, she told the chauffeur she would remit to the Martin Auto Livery for the services and he acquiesced. She subsequently called a doctor, who examined her and found a fractured clavicle. Plaintiff paid the

Martin Auto Livery by check for the taxi cab and received a receipt from defendant.

The only substantial variance in the testimony is as to the telephone conversation at the time plaintiff ordered the cab. Earl Martin testified that he is the son of defendant and employed by her; that he received the telephone message from plaintiff, and claims that he then told plaintiff that on account of the snow they were not running their taxi cabs on side streets but only on carline streets; that they had a man in the office who would go on the street and hire a strange cab, but plaintiff denies that anything was said about another cab and testified she did not know that any other auto concern called for her. These variant stories were properly submitted to the jury and we cannot say that the credence given to plaintiff's version was improper.

Defendant did procure a taxi cab from the American Cab Company to fill this order, and the witness, Earl Martin, gave the chauffeur of the taxi cab instructions to call for plaintiff. Under these circumstances defendant was liable for the injuries to plaintiff caused by the negligence of the chauffeur. To paraphrase what is said in the opinion in Smith v. Devlin, 127 Ill. App. 492. When the defendant undertook to furnish the plaintiff a taxi cab and sent to her a taxi cab and chauffeur, such taxi cab and chauffeur became pro hac vice the taxi cab and chauffeur of defendant. Margaret Martin, and her duty and liability in respect thereto were not affected by the fact that she had borrowed or hired said taxi cab and chauffeur from the American Cab Co., for the purpose of furnishing same to plaintiff.

Complaint is made of the entry into the case after trial had begun of Mr. Edward Maher, as a trial attorney for plaintiff. Ordinarily this would be objectionable, although in this case only one witness had partially testified. When Mr. Maher

did appear he made an offer to interrogate the jurors as to whether they knew him or not, but this offer was declined and after some colloquy counsel for defendant withdrew his objection and the cause proceeded without any objection on his part. Furthermore, this point does not appear in the written motion for a new trial. Failure to specify this point was a waiver. Janeway v. Burton, 201 Ill. 78.

It is argued that the court committed prejudicial error in sustaining an objection to defendant's offer to prove that the American Auto and Taxi Co. carried plaintiff; that this company was in the taxi business, hiring chauffeurs, operating cabs, and carrying passengers, and that defendant had nothing to do with hiring these chauffeurs and had no connection with the American Company. The competency of this is predicated upon the assumption that the special plea denying ownership of the taxi cab made ownership an issue. This is not true, as the declaration did not allege that defendant owned the vehicle; it alleged operation and, in law, the taxi cab was operated by the defendant although she may not have owned it or hired the chauffeur generally.

It does sufficiently appear in the record that the defendant, Margaret Martin, never had any interest in the American Auto Livery Co., and the character of its business was testified to by its superintendent. Plaintiff's case is not based upon either ownership of the vehicle in question or any interest in or control by the defendant of the business of the American Taxi Cab Co. Her case is based upon the principle stated in Smith v. Devlin, supra.

Instructions offered on behalf of defendant and refused were properly refused. They seek improperly to inject the issue of ownership into the case. It is said that other in-

structions are objectionable, but in what respect we are not told.

Plaintiff's theory of her claim was in accord with the law, the verdict of the jury is justified from the evidence, and the alleged errors upon the trial do not require a reversal, hence the judgment is affirmed.

AFFIRMED.

Holdom, J. J., and Dever, J., concur.

WILLIAM AHRENS, a minor, by
HENRY A. AHRENS, his next
friend,

Appellee,

vs.

WEBER'S LAUNDRY, a corpora-
tion,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 647

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

William Ahrens, a minor, by his next friend, in an action in tort for damages resulting from the bite of a dog alleged to belong to and to be in the possession of the defendant, upon trial by a jury had a verdict and judgment for \$275. The defendant asks that the judgment be reversed.

It is said that the court committed reversible error in the oral instruction given to the jury in which they were told that two persons, Henry Klein and Jacob Weber, who had been made defendants, were dismissed from the case, leaving the Weber's Laundry as the sole defendant; and it is argued that from this the jury might infer that the defendant corporation was kept in the case because the court deemed it guilty. The instruction does not bear this interpretation; it only told the jury that the case had been dismissed as to Klein and Weber as individuals because there was no evidence that the dog in question was in the possession of either one of them, but that there was some evidence "perhaps" touching the question as to whether the dog was in the possession or control of the company. This was not the expression of any opinion as to the facts, but was simply the statement that there was some evidence on this question, which the jury already knew. The instruction is not open to the objection that it pre-

sumes to pass upon any fact or is based upon the assumption of any ultimate fact.

It is said that the verdict is manifestly against the weight of the evidence in that there is no evidence that the defendant possessed or controlled any dog, or that it failed to muzzle or properly manage, control and guard it, or that the defendant had knowledge of its vicious character. We cannot say that the jury was not justified in returning this verdict. In addition to the testimony of other witnesses, there was the definite testimony of one of the employes of the defendant who had been working in the laundry some four years; she testified as to the presence of the dog and that she herself had been bitten by it. Henry Klein, president of the defendant company, admitted that to his own knowledge the dog had bitten three people; that sometimes it had a muzzle on and sometimes not, and sometimes had on a chain and other times was without one.

The plaintiff, who was less than ten years of age at the time of the occurrence, testified that on a Sunday morning, he was sent by his father, as was customary, to defendant's laundry and found the front door locked; that a man from the inside told him to go around the side way, and when he had gone a few feet around the side the dog jumped out and bit him.

There is virtually no dispute as to the facts as to how the boy received the injuries, and there was sufficient evidence of possession and control of the dog by defendant, knowledge of its character and that it was unmuzzled and unchained, to justify the jury in its conclusion.

There is no sufficient reason for a reversal and the judgment is affirmed.

AFFIRMED.

Heldom, P. J., and Dever, J., concur.

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255 - 26027

CHARLES W. FOAGUE et al.,
copartners, etc.,

Appellees,

vs.

ALBERT E. COOK,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 A. 647

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, real estate brokers in Chicago, brought suit for payment for services alleged to have been rendered defendant in procuring Maybelle C. Barrett to sign a written contract to exchange certain of her property for property of the defendant upon the terms proposed by defendant, for which services defendant agreed to pay plaintiffs a commission of 3 per cent of the value of his property of \$200,000, amounting to \$6,000. Upon trial by the court judgment was entered against defendant for this amount, from which he appeals.

Respective counsel have discussed at some length, with numerous citations, the question of the legal relations between a broker and principal and the circumstances under which a broker is entitled to a commission. There is virtually no dispute as to the legal principles involved. In our opinion this case turns upon the facts presented by the evidence.

With reference to the suggestion by plaintiffs' counsel that as no propositions of law were submitted to the trial court, such questions cannot be raised in this court, it has been held that this is not the rule in the Appellate courts. City of Chicago v. Bartels, 146 Ill. App. 180; Janski v. Chicago & North Western Ry. Co., 181 Ill. App. 565; Educational Aid Society v. Bush Temple Conservatory, 187 Ill. App. 250; Bradish v. Yocum, 130 Ill. 386.

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The testimony was presented by four witnesses, two for each side. In the fall of 1918 Ben Wilson, an agent for plaintiffs, discussed with defendant the exchange of property owned by defendant in Omaha for property owned by Raybelle Clary Barrett in Georgia. The following year this was again discussed and in July, 1919, defendant agreed, if Wilson would obtain a conditional contract signed by Mr. and Mrs. Barrett, to trade their Ball plantation in Georgia, subject to a \$55,000 mortgage, for defendant's Omaha building, subject also to a \$55,000 mortgage; that after the Barretts had gone to Omaha and inspected defendant's building and it should be acceptable to them, the defendant would then go to Georgia and examine the plantation to ascertain whether the trade would be acceptable to him. Defendant says he then told Wilson he would want his superintendent, J. S. Staton, to go south with them for the purpose of inspecting the Georgia land. Wilson testified that at this time, in answer to an inquiry, he told defendant that in case the trade was consummated McKey & Lougue would charge defendant the Real Estate Board rates of commission for their services as brokers. Pursuant to this, on August 1, 1919, a conditional contract looking to the exchange of the properties was signed by the defendant and by Mrs. Barrett, subject to the inspection and approval of the properties by the respective owners. The Barretts went to Omaha and inspected defendant's property and indicated their satisfaction with it. Some weeks afterwards defendant, Mr. Wilson and Mr. Barrett left Chicago for Georgia on the trip of inspection. Mr. Staton joined the party and Wilson was told that Staton was to inspect the property for defendant and to advise him in the matter. Some three or four days were spent inspecting the Ball plantation and also another plantation owned by Mrs. Barrett. The party returned to Chicago about September 1st and some days later Wilson called

upon defendant and was told by defendant he had made up his mind not to make the trade. Wilson says that afterwards, about September 16th, he called upon defendant and was told by him that he would trade if Mrs. Barrett would put in the other plantation with the Ball plantation, subject to a \$75,000 mortgage and take the Omaha building subject to a \$75,000 mortgage; that subsequently he secured the consent of the Barretts to this proposition and a contract to this effect was drawn by plaintiffs and presented to defendant for signature, but that after holding it for some time defendant refused to sign.

Defendant's version of this latter conversation is that he informed Wilson that Staton had an interest in the Omaha property to the amount of \$25,000 and that Staton was opposed to the trade; that defendant finally said in substance he would leave the matter to Mr. Staton and that if Staton was willing to put his money in as a speculation in the Georgia lands and was willing to manage their sale, defendant would consider it; that to another agent calling from the plaintiffs, he said that he would refer the matter to Staton; that subsequently when Wilson presented the form of contract incorporating the new deal to defendant for execution, defendant said he could not sign it until Staton had passed upon and approved it. Later Wilson called upon defendant with a letter to Staton which Wilson had prepared and asked defendant to sign, but defendant refused, but prepared a letter of his own dictation directed to Staton, which he signed and gave to Wilson to be presented to Staton. Wilson says he did not promise to see Staton, but said that he would think about it, and after talking it over with one of his associates he decided not to see Staton. This letter was ruled out as incompetent by the trial court, but for reasons indicated hereafter we think it was competent and material.

It is as follows:

"September 27, 1919.

Mr. J. S. Staton,
Kankakee, Illinois.

Dear Mr. Staton:

The bearer of this letter, Mr. Wilson, whom you have met, desires to converse with you on the transfer proposed of the Omaha Building, for the Ball Ranch and Greenfield Boyston ranch, respective properties clear and free from all incumbrance, excepting and same mortgages aggregating \$75,000.00 each. So far as incumbrances are concerned this item is equal on both properties referred to.

Mr. Wilson figures that he has secured a wonderful opportunity for you to invest your interest in the Omaha building, and also feels that even though the development idea which you and I have discussed so thoroughly be not even entertained, the chances to secure the greatest amount of revenue be in favor of the two ranches referred to in preference to the Omaha Building. I have expressed myself fully to you as being of the same opinion, nevertheless I do not wish to infer that this should in any way influence you one way or the other. Your money is at stake, and I would naturally want you to be thoroughly satisfied in your own mind as to the benefits to be derived thereby. Mr. Wilson seems to be very fair and conscientious and I therefore feels that a conference with you to more fully digest the various views and opinions in so important a matter is in line. I take this stand, knowing firmly how you feel towards your family and your own inclination, therefore I am reluctant to ever suggest in this case, other than above set forth, and I may add the following:

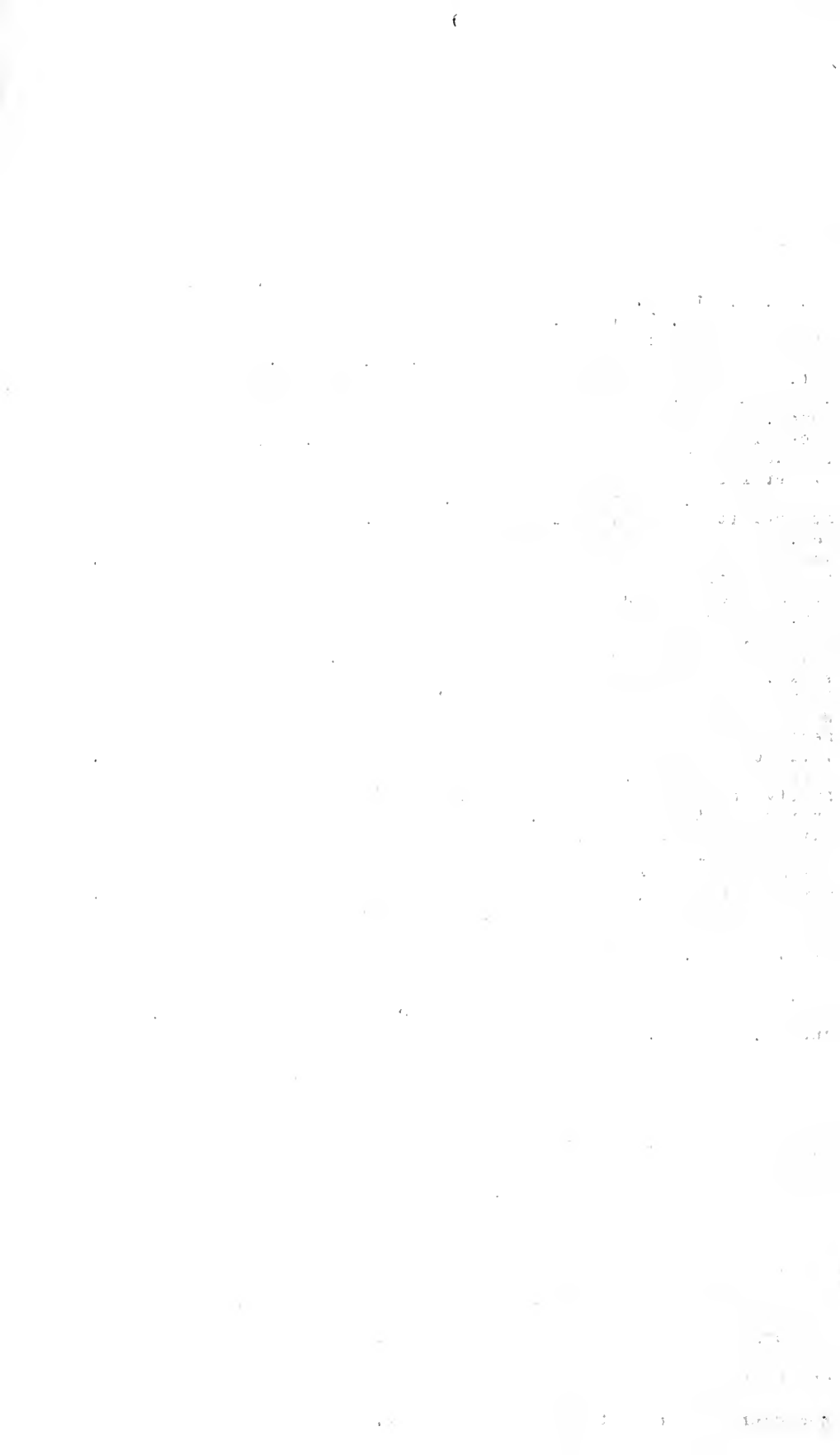
If the Ball Ranch be of soil suitable for live stock purposes or pecan and peach cultivation without too much fertilization necessary, it would seem to me safe. On the other hand, if it be not a fact or proven, I would still question the venture from our particular standpoint of development, unless again verified, by you, myself or both of us. With an impartial sentiment, I am now putting this proposition up to you for your final decision.

Thanking you for the courtesies in behalf of Mr. Wilson and Mr. Barrett,

Very truly yours,
(Signed) A. E. Cook."

The next move in the matter was a communication from the attorneys of plaintiffs threatening defendant with suit unless the commission claimed was paid.

Staton's testimony corroborates defendant's. He says that when they left for Georgia Wilson was informed of his interest in the matter and that Wilson said it was up to Staton whether the deal would go through and that he, Wilson, "wouldn't make a deal under any circumstances unless I was perfectly satisfied when I looked over the property to make the deal." There is also evidence



that defendant and Staton had been associated in business matters for many years; that Staton acted as superintendent of defendant's properties besides having an interest of his own in the (naha property, and that if defendant acquired the Georgia properties it involved Staton's removal thence to handle them.

It seems to us clear that only one conclusion can be drawn from these facts, namely, that at no time was there an unconditional contract between the principals for the exchange of their respective properties. The deal was subject to the inspection and approval not only of Mrs. Barrett and of the defendant, Cook, but also of Staton, representing and advising Cook, and on his own behalf. There is scarcely any denial of the fact that in the first proposition the consent and approval of Staton was an essential factor and a necessary condition to defendant's acceptance. It would therefore seem highly improbable that defendant would consent to the second proposition, as claimed by plaintiffs, without again submitting it for the approval of Staton. The letter before referred to (defendant's exhibit 2 for identification) we think clearly shows the condition of the proposed transaction at that time. It is convincing as to the situation, and plaintiffs, through their representative, Wilson, were fully informed as to the necessity of securing Staton's approval.

We are of the opinion that the two letters - defendant's exhibits 1 and 2 - should have been received in evidence and considered by the court. The letter (exhibit 1) was written by the defendant to the attorney for plaintiffs in answer to a demand for commissions. In Morton v. Barney, 140 Ill. App. 333, it was held as material under similar circumstances that the recipient of the letter made a denial as soon as he had any intimation that the brokers claimed he owed them a commission.

The other letter was, as we have above said, admissible

as tending to throw light upon the facts of the situation and as affecting the probability or improbability of the variant stories of the witnesses. People v. McCann, 247 Ill. 131; Hunter v. Harris, 24 Ill. App. 640; Black v. W. & St. L. & P. Ry. Co., 111 Ill. 351; Knapp Printing & Binding Co. v. Guthrie, 64 Ill. App. 523.

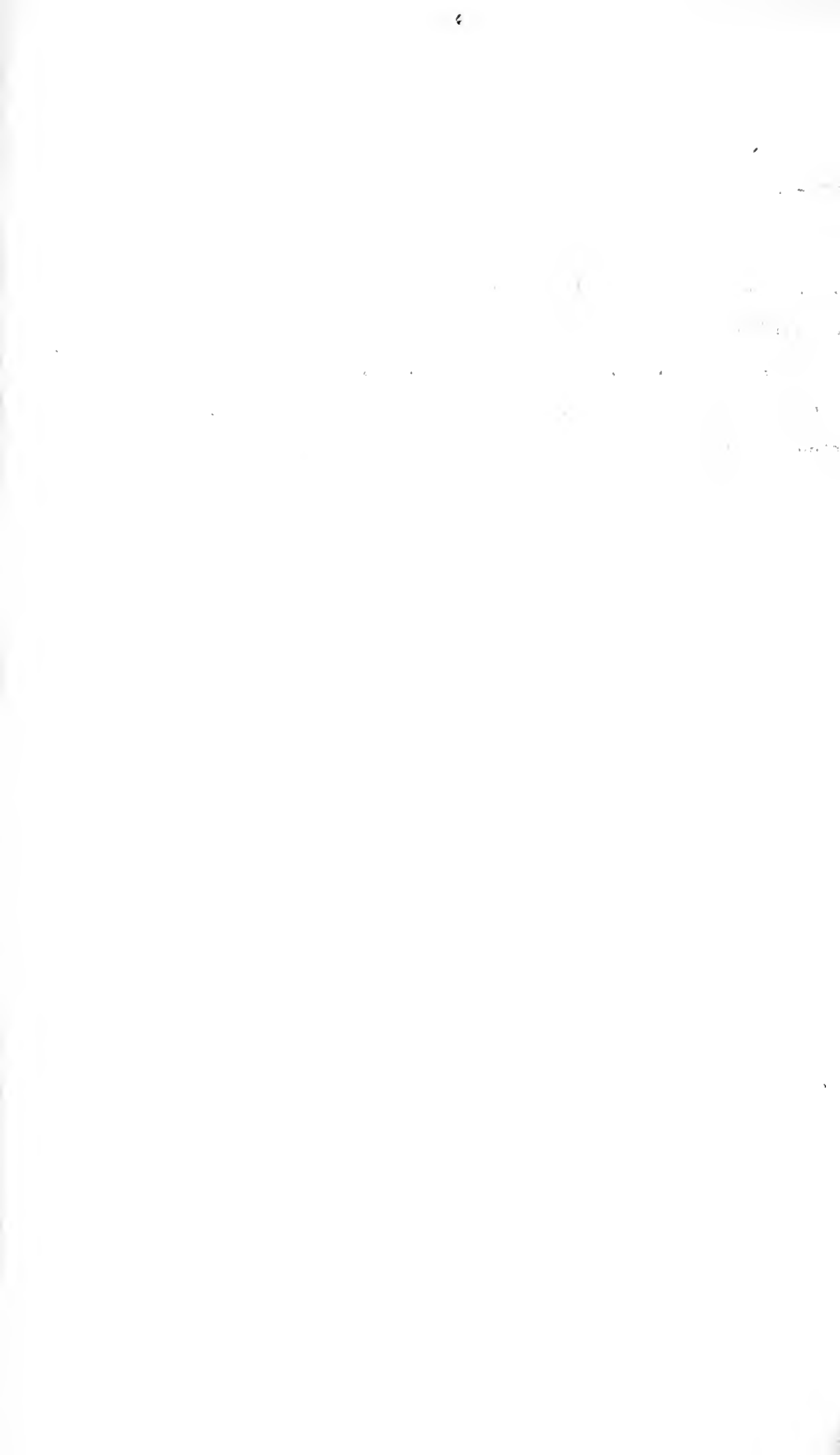
The trade which was the subject matter of negotiations never was consummated. It was the position of the defendant and understood by plaintiffs that no trade could be made or contract therefor be entered into without the approval of Staton. Such approval was never obtained, and as the brokers' commissions were conditioned upon the consummation of a binding contract, they are not entitled to judgment therefor.

For the reasons above indicated the judgment is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

Heldom, P. J., concurs.
Dever, J., dissents.

We find as facts in this case that the defendant, Cook, did not agree either expressly or impliedly to pay the plaintiffs a commission of 3 per cent on the value of his property of \$200,000, amounting to \$6,000, or any commission or compensation whatever, and that the plaintiffs did not procure a contract between the defendant, Cook, and Raybelle Clary Barrett for the exchange of her property for properties of the defendant upon the terms proposed by the defendant.



270 - 26042

FRANK H. DAVIS,
Appellant,

vs.

THEO. B. W. ZUMSTEIN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 647

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

Upon trial of a suit upon a promissory note the verdict of the jury was adverse to plaintiff and judgment of nil capiat was entered thereon, from which plaintiff appeals. The note in question was dated August 16, 1916, payable thirty days after date to the order of plaintiff, for \$2,000, and was signed by defendant. It contained a power of attorney to enter judgment, which was done, but subsequently under order of court the judgment was opened and defendant was granted leave to make defense, judgment to stand as security. Upon trial the jury found in favor of defendant.

The present note was given in connection with transactions between these parties which have already been under consideration by us. In the opinion in Davis v. Wolf et al., number 25757, filed by this court March 8, 1920, we gave the conflicting claims of the parties as to the facts. That case also involved a promissory note given by the defendant, Zumstein, to the plaintiff, and in that case also the jury found against the plaintiff.

The sole issue is a question of fact as to whether the note was given as part of the purchase of Florida land by the plaintiff to the defendant, or was given solely for accommodation and without any consideration.

The jury could properly believe that in reply to the inducements made by the plaintiff to the defendant to persuade him to purchase more Florida land, defendant said that he was through

with Florida lands and had nothing more to invest in them; that upon the request of the plaintiff that the defendant assist him to acquire more land by signing the note, the note in question was executed; that there was no consideration therefor, but that it was given solely for plaintiff's accommodation and upon his representation that he would take it up in ten days. As we said in our opinion in the other case -

"The credibility of the witnesses is virtually the sole matter to be determined, and the jury with its opportunity of seeing the witnesses upon the stand is much better qualified to pass upon this than is a court of review. There is nothing inherently impossible or improbable in Zumstein's version of the transaction and he is supported by apparently disinterested witnesses whose stories are consistent with each other and the circumstances, while a justifiable doubt was raised as to many particulars of plaintiff's testimony. However, it is not necessary for this court to determine definitely which of the parties is telling the truth. We are called upon to determine only whether the conclusion of the jury was manifestly against the weight of the evidence. It would unduly extend this opinion to narrate the many details which might properly have persuaded the jury to its conclusion. Having these in mind, together with all the circumstances involved, we are unable to say that the jury clearly was in the wrong."

The judgment by confession was entered October 17, 1916, and November 17, 1916. defendant filed his petition in support of his motion to open up or vacate this judgment. Plaintiff now urges that the court was without jurisdiction because the motion was not made within thirty days after entry of such judgment, under section 21 of chapter 37, Illinois Statute. This statute also provides that such a judgment may be vacated or set aside by a petition setting forth the grounds for vacating which should be sufficient to cause the judgment to be vacated or set aside by a bill in equity. The petition in question set forth in detail the transactions between the parties tending to show that the note was signed as an accommodation without any consideration. We hold that the court acted properly under the statute. Schmalhausen v. Zukowski, 183 Ill. App. 305. Defendant was guilty of no laches, as his petition was filed only thirty-one days after the date of

the judgment.

Furthermore, plaintiff went to trial upon the issue formed by the petition after the judgment had been opened up. He thus waived any and all objection to the sufficiency of the petition. Locks v. Bradley, 179 Ill. App. 1; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61.

The burden of plaintiff's brief seems to be the alleged misconduct of the attorney representing defendant. We have examined these complaints and while it is evident the case was sharply tried and apparently with some feeling between opposing attorneys, we find nothing which would warrant a reversal on this ground.

Objection was made to instructions given by the court, but it is not made to appear that the errors in this respect, if any, are of sufficient importance to require a reversal.

From a consideration of the record it is not possible for us to say that the verdict of the jury was clearly against the weight of the evidence, and the judgment will be affirmed.

AFFIRMED.

Heldom, P. J., and Dever, J., concur.

294 - 26066

SUSIE McARTHUR,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
impleaded with the CITY OF CHICAGO,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

219 L.A. 648

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for personal injuries. Upon trial a verdict was returned finding the City of Chicago not guilty, the other defendants guilty, plaintiff's damages assessed at \$1250 and judgment for this amount entered, from which the street car companies, hereinafter called defendants, have appealed.

The gist of the declaration was that plaintiff was a passenger on one of the street cars of defendants October 8, 1917; that in stopping the car to permit plaintiff to alight from the rear platform it was negligently stopped with the rear platform opposite a manhole from which the cover was missing, the supporting rim beneath it having become worn, rusted and decayed; that although plaintiff was in the exercise of due care, she unavoidably stepped into the opening of the manhole and was thrown down and injured.

There is virtually no dispute as to the facts. State street in Chicago runs north and south and is intersected at right angles by 63rd and 64th streets, 63rd street being the most northerly. At the time of the accident it was the custom to stop cars to receive or discharge passengers at the near crossing of street intersections. About ten o'clock in the evening plaintiff was a passenger on a southbound State street car; as it approached 64th street she indicated by pressing a button

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that she desired to leave the car at that street. The car stopped on the north side of 64th street at its regular stopping place, and plaintiff, with a friend, was the first of the two to attempt to get off after the conductor had opened the side door to permit them to alight. Plaintiff stepped from the platform to the step of the car and then stepped down, and her left foot went into the uncovered manhole, the leg entering as far as her hip. There was evidence that the cover was down in the bottom of the hole, the reason being that the iron rim of the manhole which supported the cover was eaten off with rust so that about half of it was gone.

"While a street railway company may not be responsible for the condition of the street, unless it be between or in the immediate vicinity of its tracks, yet it will be liable to a passenger injured without his own fault, in consequence of stopping its car for the passenger to alight at an improper or dangerous place, especially where no warning of the danger is given to the passenger." (Thompson on Negligence, vol. 3, section 3525.)

This rule is well established. West Chicago St. R.R.

Co. v. Buckley, 102 Ill. App. 314; Slocum v. Peoria Ry. Co., 179 Ill. App. 317, and many other cases. Defendants seem to concede this to be the rule, but assert that in the instant case there must also be proof that defendants knew the manhole was open, or that it had been open such a length of time that in the exercise of reasonable care they should have known it. It was not necessary to support the charge of negligence to show the length of time the manhole had been open; it was sufficient to show it had fallen into such a state of disrepair through gradual rust and decay that it had become unsafe as a landing place. The rusty condition of the rim must have existed for some considerable length of time before the cover fell into the manhole. Reasonable care does not mean, as seemingly assumed, that every time a street car of defendants stops at a street crossing the conductor or motorman should first alight and examine carefully street paving and manholes in the

vicinity before permitting the passengers to alight. The jury might properly conclude that at least some inspection at intervals should be made in the exercise of care for the safety of passengers. In the present case a slight examination of the condition of the manhole would have disclosed that it was dangerous to alighting passengers. This could have been avoided by instructions that the car should stop elsewhere. To be wholly indifferent to such conditions is hardly consistent with the duty of exercising the highest degree of care and caution for the safety of passengers, which is the degree of care the law demands. Thompson on Negligence, vol. 3, section 3475; Appel v. A. C. St. L. T. Co., 207 Ill. App. 563. We see no reason to disagree with the conclusion of the jury as to the negligence of the defendants.

Plaintiff was not guilty of contributory negligence. This was not her customary place of alighting, as she had intended to stop at 63rd street but was carried a block farther. It was a dark and misty night, and while it was true that the lights of the car were burning and there was an electric light in the rear vestibule, these would only serve to make indistinct the condition of the street where she was alighting. It is well known that a person coming from a brightly lighted room is momentarily blinded when stepping into darkness. The question of plaintiff's conduct was properly left to the jury and its conclusion on this point will not be disturbed.

It cannot be said that the award of \$1250 is so excessive as to require a reversal. Plaintiff's left leg was bruised from the knee to the hip, also her left arm; she complained also of pain in other parts of her body, and it is claimed that there is a large hole in the leg. She used crutches for some time and claimed she was still suffering at the time of the trial. While the amount

of the award may be large, the injuries are such that we could have no proper basis for concluding they are so excessive as to be disproportionate to the injuries.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Holdom, I. J., and Dever, J., concur.

325 - 26097

A. G. SPRECHER,
Appellee.

vs.

WILLIAM LOESER,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

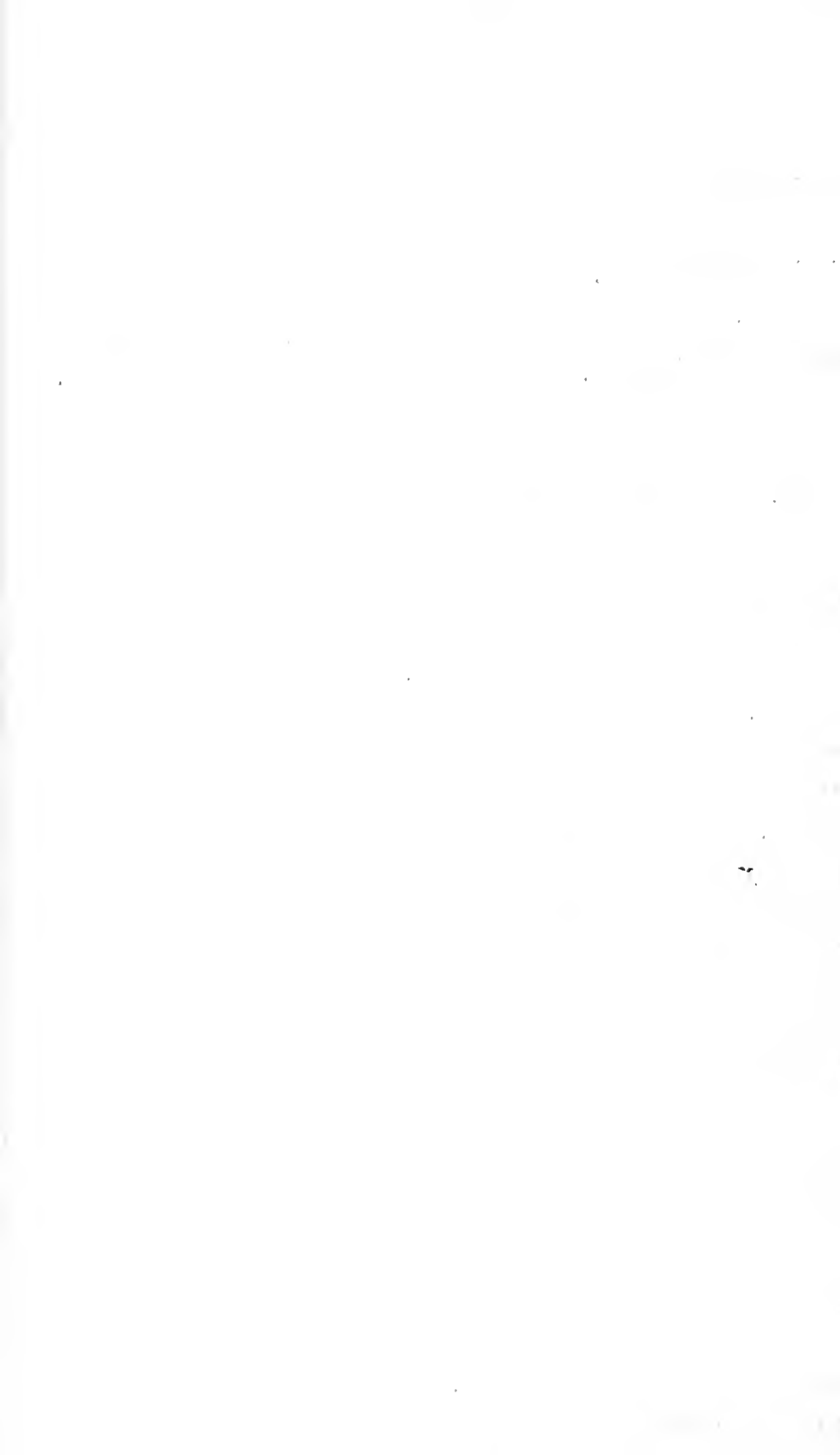
2101 A. 648

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The defendant, in an action of forcible detainer, upon trial by a jury suffered defeat and has appealed to this court.

The defendant, a dentist, occupied the premises in question, a suite of offices in an office building, under a written lease from the plaintiff. The lease provided among other things that the offices should be used for "physician's offices, for himself only" and for no other purpose. In and by the lease he also agreed that there should be no cooking therein and that no objectionable noise or odor should come from the premises and that no stove should be installed. The substantial question upon the trial was as to the violation of these conditions of the lease by the defendant. While there is a conflict in the testimony, the jury properly could believe there was cooking of steak, onions and coffee, accompanied by the sound of frying grease and noisome odors in the offices leased to defendant four or five times a week. The jury having found this as a fact, there could be no question that this was a violation of the conditions of the lease which justified its termination by the landlord.

By the terms of the lease the lessee waived the necessity of any statutory notice. Most of the cases cited with reference to waiver of notice are concerned with cases of non-



payment of rent. We are referred to no decision holding that a tenant who has violated such conditions of his occupancy is entitled to notice where such notice has been expressly waived in the lease.

Complaint is made of questions asked by plaintiff's attorney, particularly some which are said to touch upon defendant's nationality and patriotism. Of course such matters had no proper place in the trial, but examination does not disclose anything markedly prejudicial. At least we doubt if defendant suffered any disadvantage, as the names of both parties would indicate a common national antecedent.

A suggestion is made concerning the instructions, but there is only a reference to them as general and vague, and this does not give us sufficient basis for holding them to be prejudicial.

There were no reversible errors upon the trial, and as the conclusion of the jury was justified upon the evidence the judgment is affirmed.

AFFIRMED.

Holdom, F. J., and Dever, J., concur.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error.

vs.

FRANK CALKINS.

Plaintiff in Error.

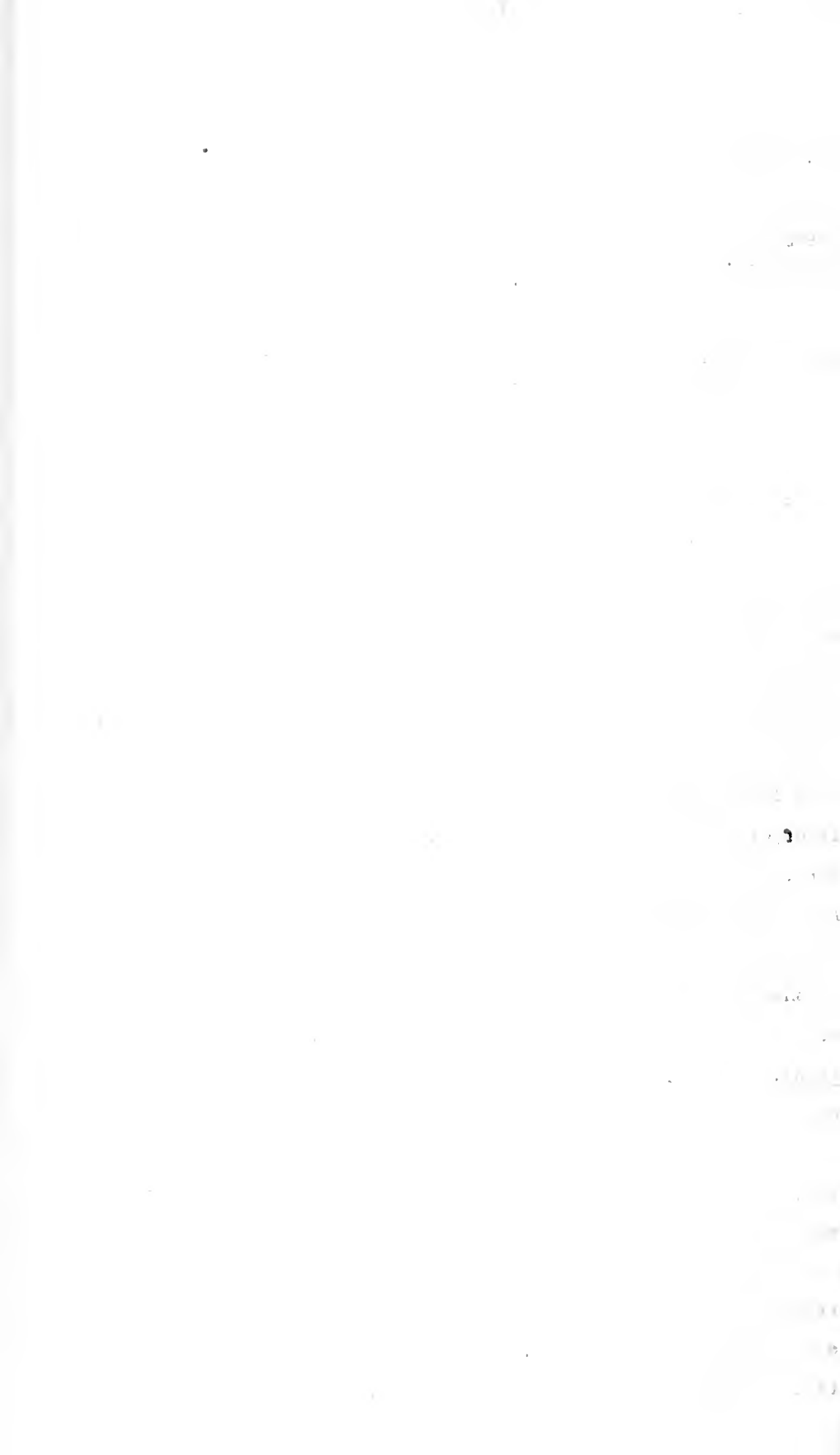
ERROR TO THE CRIMINAL COURT
OF COOK COUNTY.

219 I.A. 648

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

The defendant, Calkins, was charged in an indictment with doing certain acts which directly tended to render a certain female child of the age of sixteen years delinquent, by ravishing and carnally knowing her. He pleaded not guilty and upon trial was found guilty in manner and form as charged in the indictment. His motion in arrest was overruled and he was sentenced to two months imprisonment in the House of Correction. He sued out a writ of error from the Supreme court, alleging that the statute under which he was tried was unconstitutional. The Supreme court held that the constitutionality of a statute was not involved, and as this was a criminal case below the grade of felony the writ should have been sued out of the Appellate court, and the cause was transferred to this court for review. People v. Calkins, 291 Ill. 317. There is no bill of exceptions in the record and the evidence is not before us.

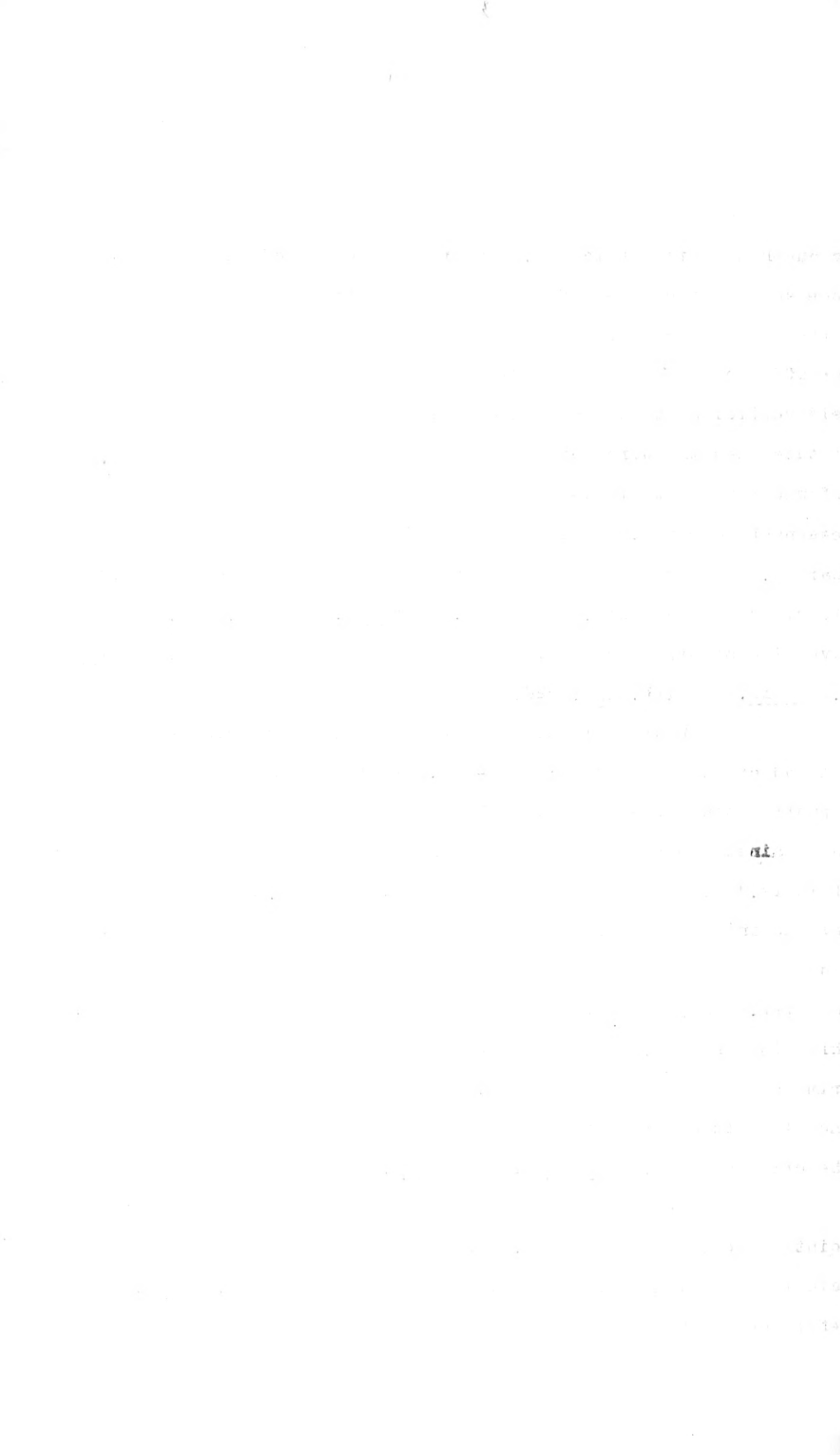
It is said the indictment is defective and insufficient. It is substantially in the language of the statute and charges that the defendant "did knowingly, unlawfully and willfully do certain acts which then and there directly tended to render a certain female child under the age of eighteen years, and of the age of sixteen years, to-wit, one Julia Ellen McCanney, a delinquent child." (Chapter 38, section 42 hn. Hurd.) In absence of a motion



to quash this is sufficient. Under section 408 of the Criminal Code an indictment is sufficient which states the offense in the terms and language of the statute so plainly that the nature of the offense may be easily understood by the jury; and it has been held sufficient to charge the offense in the language of the statute when the words of the statute so far particularize the offense that by their use alone the defendant is notified with reasonable certainty of the precise offense with which he is charged. This was the ruling on an indictment charging indecent liberties with a child. People v. Scattura, 238 Ill. 313. We have also so held upon an indictment like the present one. People v. Travis, 202 Ill. App. 226.

Argument is directed towards the concluding words of the indictment as follows: "to-wit, did then and there ravish and carnally know the said Julia Ellen McCanney contrary to the statute and against the peace and dignity of the same People of the State of Illinois." These words are superfluous, or at most are intended only to inform the defendant and the jury of the particular acts done by the defendant tending to contribute to the delinquency of the girl. They are hardly sufficient to charge the crime of rape, which is a felony. If the evidence proves the commission of the crime charged in the indictment, the fact that it may also prove the elements of another crime does not make void the conviction of the crime charged. People v. Karpovich, 288 Ill. 268.

The above considerations sufficiently answer other points made by the defendant. We are moved to repeat what was said in the opinion of the Supreme court in this case, supra, with reference to the points made in the brief of the defendant consisting



mostly of assertion without elucidation.

We see no reason to reverse and the judgment is affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.



22 - 25062

SAMUEL P. SMURR,

Appellee,

vs.

JOHN F. KAMEN et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 648

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendant in error, Samuel P. Smurr, filed a bill in equity seeking enforcement of a certain contract entered into between him and plaintiff in error, John F. Kamen, or compensatory damages, making also as parties defendant Smurr & Kamen Company, a corporation, and all of its stockholders. From a decree in complainant's favor some of the defendants have sued out writs of error and others have appealed. The several cases have been consolidated for hearing.

Special demurrers were filed by each defendant and overruled except so far as the bill sought specific performance against the holders of certain seventeen shares of the stock hereinafter referred to. Defendants then filed a joint answer, reference was made to a master, objections and exceptions to his report were overruled, and the decree confirmed in the main his findings of fact and conclusions of law.

The contract on which the bill is based is as follows:

"This agreement made this 26th day of July, A. D. 1915, between John F. Kamen, part of the first part, and Samuel P. Smurr, party of the second part, witnesseth:

Whereas the parties to this agreement have been for many years jointly interested in the conduct and operating of a machine shop business in Chicago, Cook County, Illinois, and

Whereas each of the parties hereto has heretofore owned and represented a one-half ($\frac{1}{2}$) interest in said business; and

Whereas it has become necessary to borrow money for the conduct of said business and issue stock to various other persons, and also to issue a certificate for sixty-three (63) shares of stock to the party of the first part because of money loaned to the company by the said party of the first part; and

Further, whereas the party of the second part has continued to devote his skill, energy and industry to the said enterprise or business heretofore conducted as the Smurr & Kamen Machine Company and now conducted as the Smurr & Kamen Company; and

Further, whereas the said skilled services of the said party of the second part have contributed to the success of the Company and it is desirous on the part of the party of the first part that said party of the second part shall continue to devote his time and energy to the success of said business,

Now, therefore, the following agreements are hereby entered into by the parties hereto;

1. It is agreed that for the present, certificate of stock shall be issued to all the parties who have advanced money to the Company on the basis of the par value of said stock, to wit, \$100 per share.

2. It is further agreed that as soon as the Company is able so to do, that it shall repurchase from the parties obtaining stock for moneys advanced to the Company such stock so issued at the price of \$200 per share and that in addition thereto the Company shall pay to John P. Kamen for his services in financing the Company when it was necessary to have financial aid, the sum of fourteen hundred dollars (\$1,400), said payments, however, to be in lieu of and in full of all dividends earned by the company during the year 1915.

In consideration of said payments and emoluments made, the said party of the first part, John P. Kamen, agrees with the party of the second part that he will obtain all stock outstanding (except the ten shares now owned by the parties hereto each in his own name, making a total of twenty shares) and will either turn them into the treasury of the company as company assets or agree that same be reissued in equal parts to the parties hereto, the purpose of said agreement being to encourage the said party of the second part to devote his skill and energy and to maintain his interest in said business and to further said purposes that as far as may be legal and possible said parties hereto shall be equal in power and control and interest in said business as soon as the payments above specified have been made.

Witness our hands and seal this 26th day of July, A. D. 1915.

(Signed) John P. Kamen (Seal)
(Signed) Samuel P. Smurr (Seal)

For many years complainant Smurr and defendant John P. Kamen were partners in a machine shop business. In 1907 the business was incorporated under the name of Smurr & Kamen Machine Company, having a capital stock of \$50,000 divided into 500 shares,

of which Smurr and Kamen each took 140 shares, and another partner 1 share, which was later transferred to defendant Bessie Spencer. In February, 1915, the company owed Kamen a balance of \$6300 for money he had loaned it, and about \$10,000 in bills. About that time the company was reorganized, changing its name to Smurr & Kamen Company, and reduced its capital to \$12,500, divided into 125 shares. The old stock was turned in and canceled, and pursuant to agreement there was issued to Smurr and Kamen 10 shares each of the new stock, and to Bessie Spencer 1 share to replace her old stock, and later an additional share, which was duly paid for. The remaining shares were left in the treasury. Later 65 of the treasury's shares were issued to Kamen in payment, as he claimed, of his bill, merely to secure such payment. While their testimony is conflicting on that subject the minutes of the meeting of the directors held May 1, 1915, when the company was in this financial stress and the stock of the new company not deemed worth more than par, sustain Kamen. At that time Smurr was president of the company, Kamen secretary and treasurer, and they with Bessie Spencer constituted the board of directors and comprised all the stockholders. At that meeting, at which all of them were present, Kamen, according to the minutes thereof, which we do not regard as successfully impeached, reported that Spencer had paid for said additional share, that the company had received \$1,700 from certain parties (made defendants to the bill) for the purchase of stock at \$100 per share, and that he had advanced to the company as a loan \$6300. Thereupon, as recited in the minutes:

"On motion made, seconded and carried, the president and secretary were thereupon authorized and directed to issue certificates of stock to the following persons in the following amounts, same to be in full settlement of moneys heretofore advanced to the Smurr & Kamen Machine Company:

-4-

Clarice Peters 2 shares; Clara Peters 3 shares; Joseph J. Kamen 2 shares; Mrs. Fred. W. Peters 5 shares; Bessie M. Spencer 1 share; John T. Kamen 63 shares."

In accordance with such resolution the several shares were issued to said parties, respectively, on July 26, 1915, the date of the next annual meeting of the stockholders, thus leaving only 23 shares in the treasury.

Sometime in August, or later in the autumn of 1915, when war demands were bringing increased business to the company, the written contract which forms the basis of the bill herein, was drawn up and signed by Smurr and Kamen. For some reason not adequately explained it was ante-dated July 26, 1915, to correspond with the date of said stock certificates. The bill alleges that there was a complete understanding between Smurr and Kamen at that time that they should be equal in power, control and interest in the company. It is so asserted by Smurr, and denied by Kamen, the latter claiming that such agreement was obtained while Smurr was without his knowledge negotiating with the prospect of getting a \$100,000 contract for the company, and that Smurr withheld knowledge thereof from Kamen until after the contract was signed. This contract was subsequently entered into and with others brought great profits to the company.

Whatever were the facts at the time of signing said agreement the record contains no satisfactory record of an understanding on July 26, 1915, such as Smurr claims. If there was such an understanding it is inconsistent with plaintiff's theory that the 63 shares were issued to Kamen as collateral security for his loan to the company, and the fact that he did not control all the outstanding stock. Such theory is utterly inconsistent with what took place at said stockholders' meeting, and also with the fact that the 63 shares of stock were subsequently reissued

to members of Kamen's family with Smurr's full knowledge and acquiescence. Such reissuance was reported at the annual meeting of the stockholders July 26, 1916, at which Smurr was present, and the new certificates were signed by him as president of the company, and dividends of 500 per cent, the only dividends ever declared, were voted at that meeting with his concurrence on all the issued stock, including said 63 reissued shares. If any such understanding, as claimed by Smurr, existed at that time, or he regarded said contract as valid and enforceable it is inexplicable, when there was sufficient money in the treasury of the company, he should not have insisted on performance of the contract instead of acquiescing in the diversion of the moneys into the hands of strangers to the contract.

While the bill charges that such diversion was in pursuance of a scheme of Kamen to convert said 63 shares and dividends therefrom to his own use, it contains no averments of fact constituting fraud, and there was no proof of actual fraud. On the contrary, the record supports the conclusion that the said stock was issued to Kamen in full settlement of the loan and not as security therefor. He, therefore, held the legal title thereto with the unquestioned right to transfer said stock to whomever he chose. It matters not, therefore, whether there was any consideration for the transfer of a portion thereof to his wife and children, who were made parties defendant to the suit. In the absence of any fraud/^{on their part} it is plain that neither the transferees of said stock, nor the purchasers of the 17 shares of Bessie M. Spencer, the purchaser of 2 shares, who paid value for their stock, could be compelled to part with their legal title to their respective shares.

It is equally plain that the corporation, not being a

party to the agreement, could not be required to comply with its terms. Of course, a contract between two of its stockholders, even though they controlled a majority of its stock, had no binding force on the corporation. (Hellers v. Green, 172 Ill. 549.)

It is evident, therefore, that the nature of the contract is such, that a court of equity cannot enforce a specific performance thereof. In Horton v. Page, 305 Ill. 306, where it was sought to compel specific performance of a contract, accepted, as in the instant case, with knowledge that it could not be enforced without the consent of a third party, it was held that the parties could not enforce by bill for specific performance, and that "where the bill makes no case for specific performance, a court of equity will not decree damages."

The language of LaFolke v. Forrestall, 183 Ill. .. p. 562, on somewhat similar phases of fact, is pertinent:

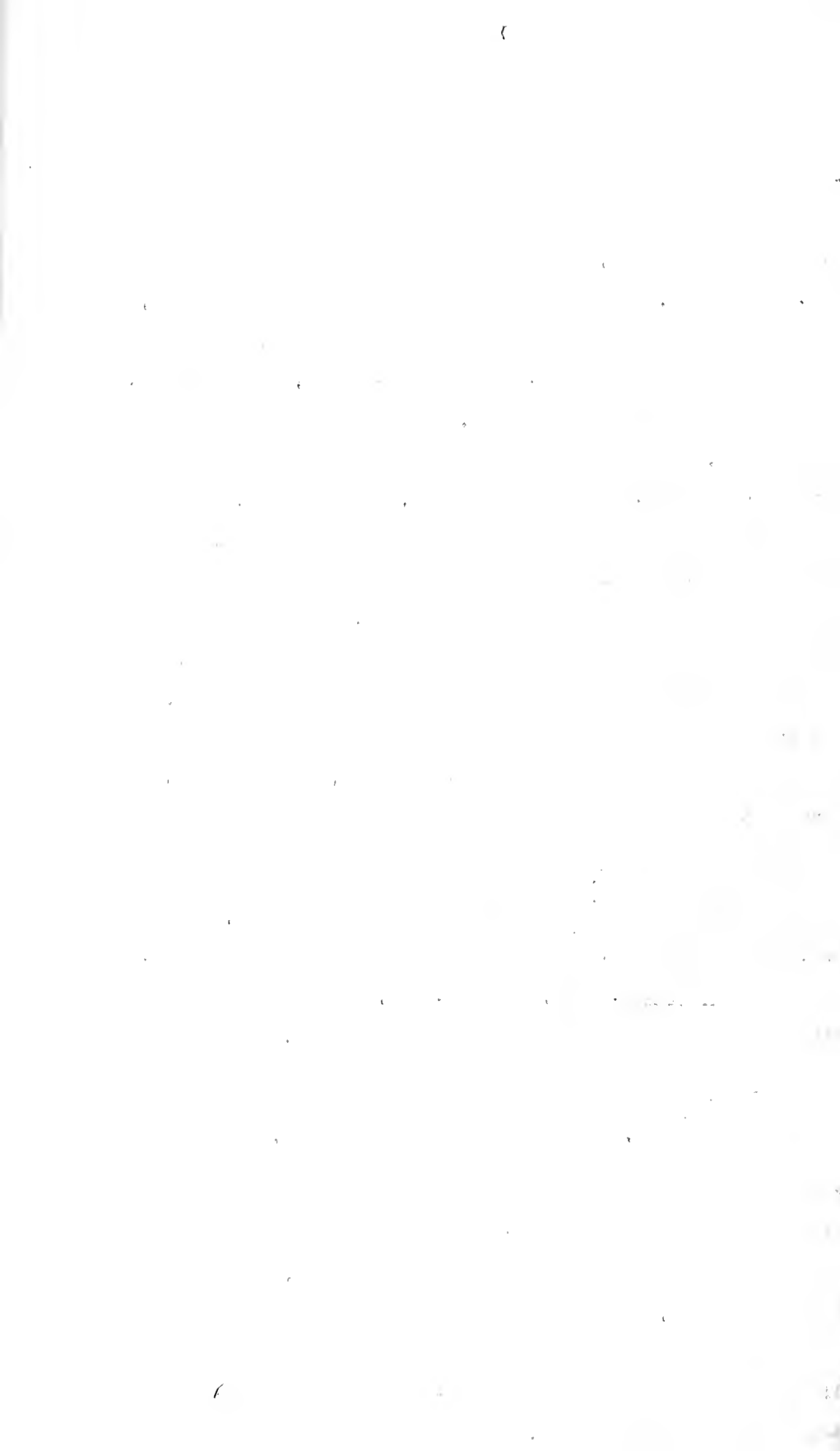
"We see no reason why a court of equity is resorted to for this remedy, nor is there anything in the nature of the transaction, since no actual fraud is proved, why an action at law should not have been appropriate."

assuming the contract is valid as between the parties thereto.

In Barton v. Wolf, 108 Ill. 195, another case for specific performance of a contract to sell shares of stock, the court said:

"To authorize a decree for performance of such a contract, it must appear that the remedy at law is inadequate. If there was a contract for the sale of shares of stock, and a breach of the contract, he can be fully compensated in damages at law."

Here the decree in effect is nothing more than a judgment for damages sustained for breach of the contract estimated at a certain value put upon the stock Kamen agreed to have purchased, together with dividends thereon, less what it is concluded Kamen was entitled to on his fulfillment of the contract. Assuming the contract is valid - which we need not pass upon - the same result could be obtained in an action at law. The contract in no event being



enforceable in equity, the bill should be dismissed.

Other grounds why there should not be a specific performance of the contract are urged, such as laches, that the contract is unilateral, wanting in mutuality, there being no promise on the part of Smarr of any kind, not even one to continue to serve the company, and also without consideration or any time limit. If the bill must be dismissed, as we hold, on the ground above stated it is unnecessary to consider the contract from other points of view.

Some question is raised as to the right of any other party to the suit than Kamen, against whom alone the decree is directed, to a review of the decree. The theory of the bill is that said 63 shares of the stock were issued to Kamen as collateral and not in full settlement of the loan, and on that theory redemption of the stock should have been required for the benefit of the company and necessarily therefore of all its stockholders. As the decree does not fully conform to that theory their interests are so adversely affected as to entitle them to assign error, and the bill, on the ground above stated, should properly be dismissed as to all defendants. The decree will accordingly be reversed, and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Hatchett, JJ., concur.

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23 - 25063

SAMUEL P. SMURR,

Appellee.

vs.

JOHN F. KAMEN et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 648

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

From a decree for appellee Smurr in the above entitled case each of the defendants to the bill prayed an appeal, jointly and severally. Appeals were perfected by the corporation, and by Minnie Kamen, the wife of John F. Kamen, individually and as guardian ad litem for her two children, Willard B. Kamen and Clifford Kamen. Writs of error were sued out by the other defendants. All have been consolidated by order of this court for hearing. Accordingly reference is hereby made to an opinion filed this day reviewing the writ of error sued out by John F. Kamen, (Gen. No. 25062) one of the defendants to the bill, in which we hold that the decree should be reversed for want of equity in the bill, and the cause remanded with directions to dismiss the bill as to all defendants. It is therefore unnecessary to reiterate the reasons therefor, it appearing, as therein stated, that the interest of each defendant is so affected as to give the right to each to appeal or sue out a writ of error.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Hatchett, JJ., concur.

24 - 25064

SAMUEL P. SMURR,

Defendant in Error.

vs.

JOHN P. KAMEN et al.,

Plaintiffs in Error.

WRITER TO
CIRCUIT COURT,
COOK COUNTY.

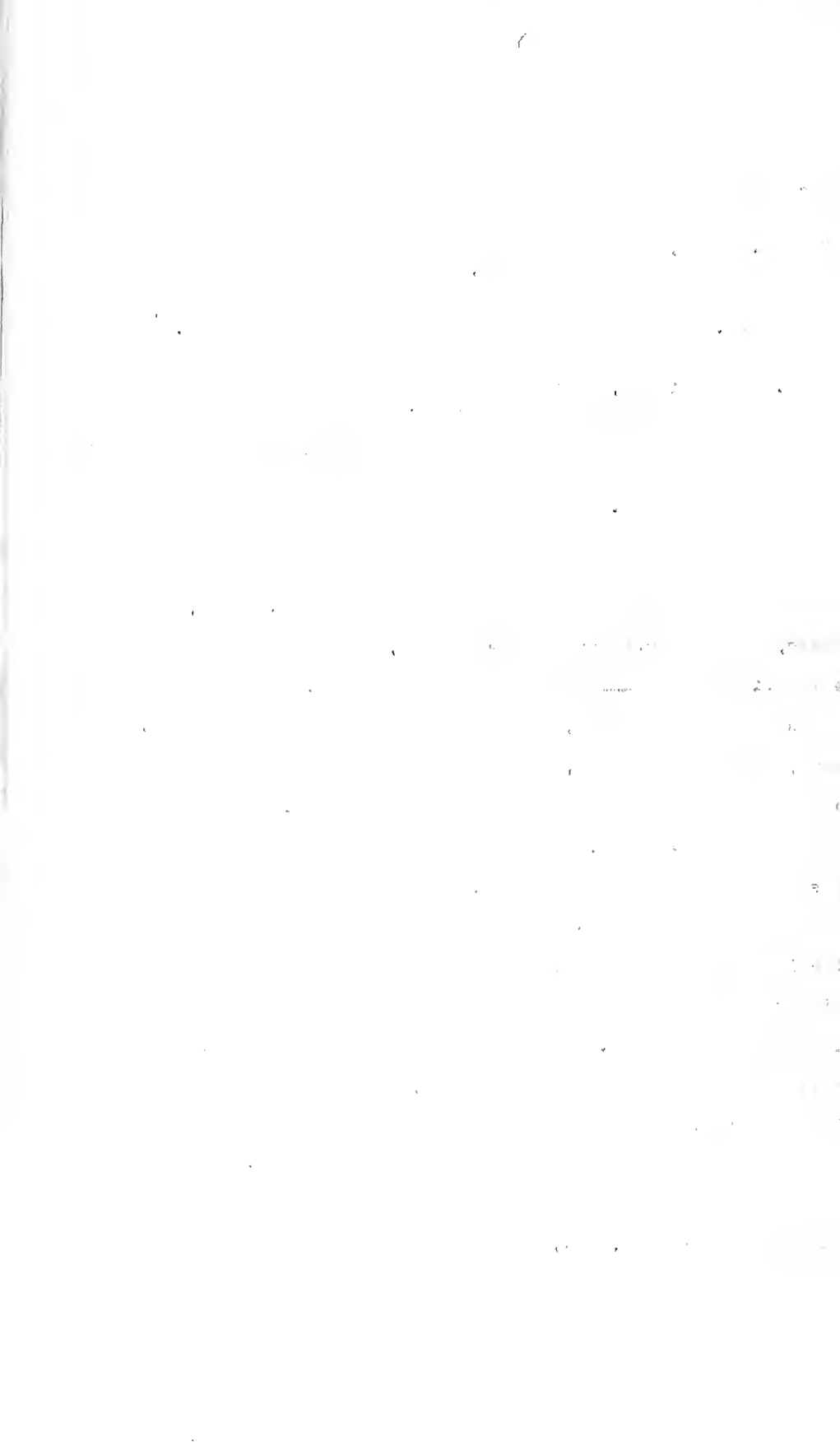
219 I.A. 649

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error sued out by Joseph J. Kamen, Mary Peters, Clara Peters and Clarice Peters, who were made defendants to the bill of complaint filed by Samuel Smurr, on which a decree was entered in his favor, especially directed against John P. Kamen, another defendant, and who were bona fide purchasers for full value of stock in the Smurr & Kamen Company, also a defendant to said bill, and whose interests are adversely affected by the erroneous decree, has been consolidated for hearing with causes Gen. Nos. 25062 and 25063 having substantially the same title, in which we have this day filed opinions reversing said decree and remanding the cause for dismissal of the bill. What was said in these opinions, being applicable to the merits of this writ, obviates the necessity of repetition.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Matchett, JJ., concur.



GLENNIS S. MURPHY,
Appellee,

vs.

OLD COLONY LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

219 I.A. 649

MR. PRESIDING JUDGE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action brought on an insurance policy issued by defendant company. It electing to stand by its affidavit of merits and appealing from the judgment entered as in case of default, the question presented is as to the sufficiency of the defense, which is, in substance, that the policy having lapsed for failure of insured to pay a premium and having been reinstated on his application containing false and untrue representations, knowingly made by him, that he was in good health and free from physical ailment, the reinstatement was null and void. The policy contained clauses conforming to the statute making it incontestable two years after its date, and in the event of default in premium payments, giving the right to reinstatement upon evidence of the insurability at the time of reinstatement "satisfactory to the company", etc. (Pars. 3 and 9, Sec. 6513, Jones & Addington Code.)

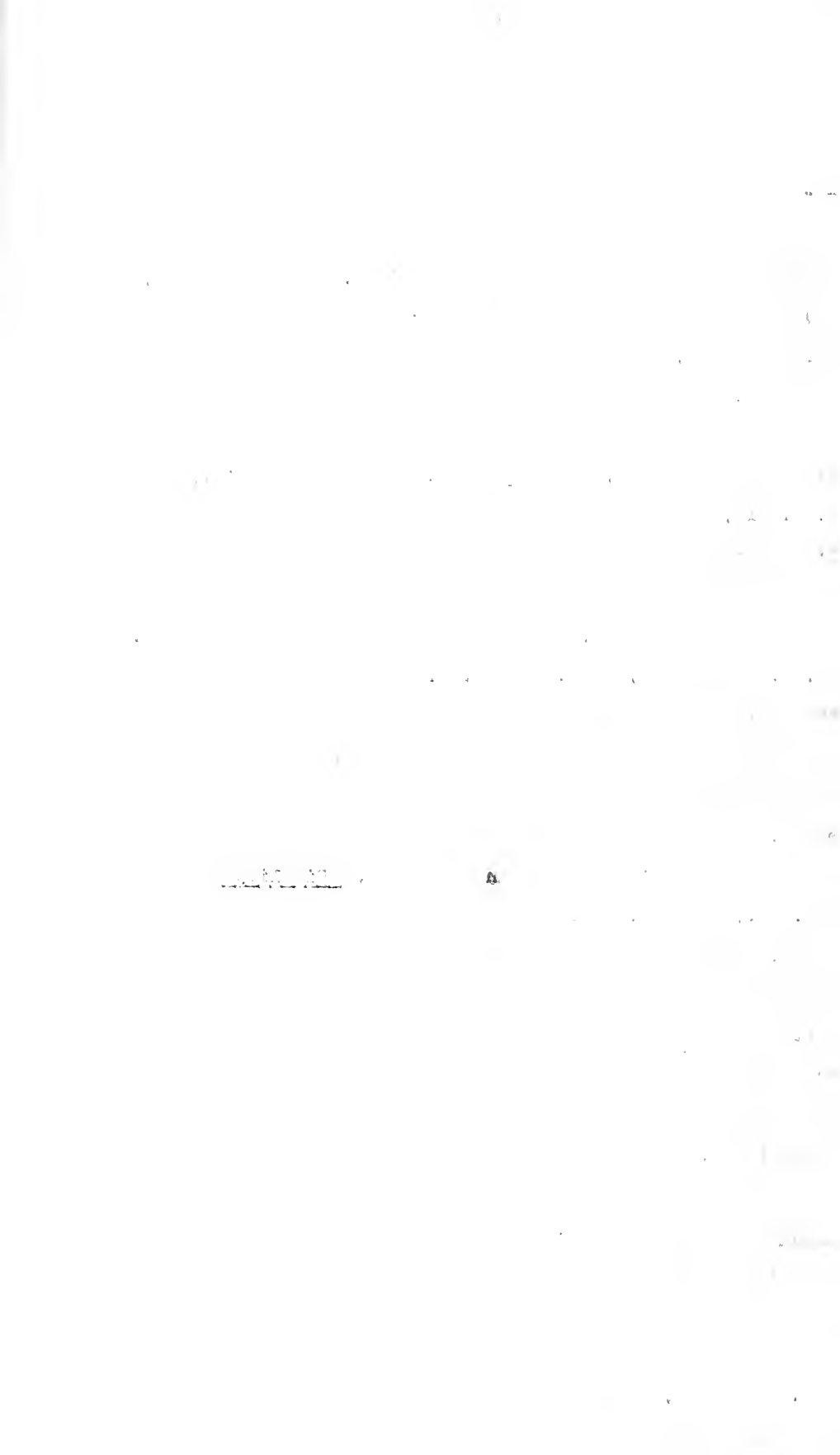
The policy was issued in 1906, the default and reinstatement on compliance with conditions required, were in July 1915, death of the insured occurred in December, 1916, and the suit was brought in June, 1917.

It is appellant's contention that it may avoid the effect of reinstatement made upon such false representations

within the period of two years thereafter. In other words, that the period of contestability runs anew from the date of reinstatement, especially where the reinstatement was induced by fraud.

In support of its position cases are cited from other jurisdictions, like Tester v. United Life Ins'n., 180 N. Y. 411, and those following it holding that the period of limitation for contest commences anew upon the reinstatement of the policy, on the theory that the reinstatement is a new contract of insurance, and cases like State Mutual Life Ins. Co. v. Rosenberry, (Tex.) 213 . . . 243, holding that while the contract for reinstatement is to be regarded not as a new contract but as a waiver of forfeiture, it reserves the right to avoid the reinstatement if induced by fraudulent means.

The rule followed in Monahan v. Fidelity Life Ins. Co., 242 Ill. 430, is that a reinstatement is merely a cancellation of the forfeiture, and that the original policy continues in full force without interruption. In that case while the death of the insured was less than two years after the reinstatement of the policy it was more than two years after its issuance, and the policy was accordingly held incontestable. Reviewing conflicting authorities on the subject the court declined to follow the rule announced in the Tester and other cases relied on by appellant, and adopted the rule of other cases referred to therein to the effect that the contract to which the limitation is applicable is that of the original application and policy, and not the reinstated one. This is in consonance with the statute which makes the policy and application therefor the entire contract

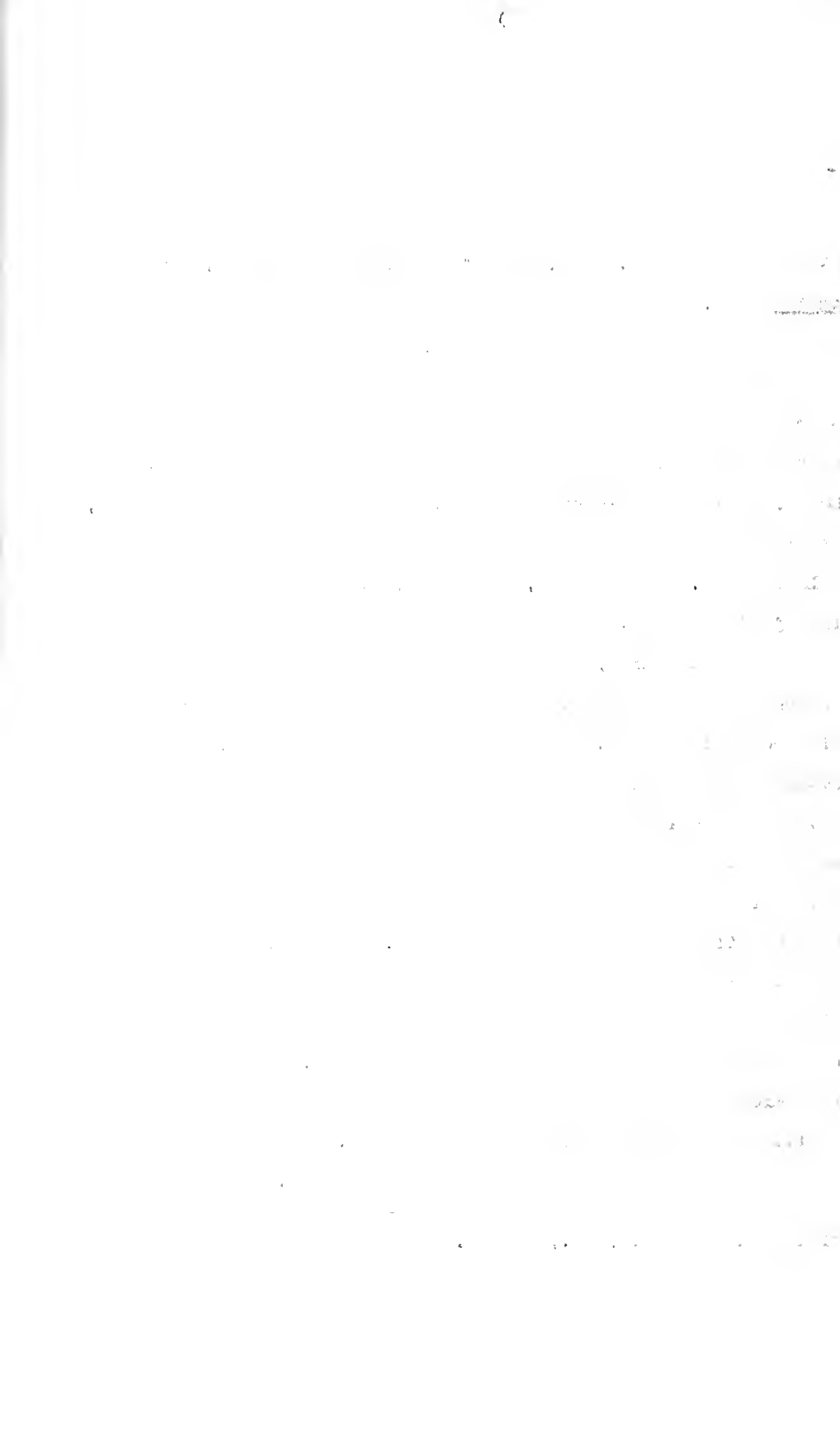


between the parties. While fraud was not the defense in the Monahan case, what was said of the contract and contestability is applicable to the facts here and justified the court below in striking the affidavit on the ground that misrepresentation in the application for reinstatement is no part of the contract between the parties which by the terms of the statute as well as the policy is made "incontestable after two years from its date", except for specified grounds not involved here and that do not include fraud. We need not, therefore, discuss authorities of other jurisdictions.

Furthermore, as the statute puts no restrictions upon the company's determination of what it shall deem statutory evidence of insurability at the time of reinstatement, the company would hardly seem to be in a position to question the waiver of forfeiture as long as it chose to accept as satisfactory the mere statement of the insured with regard to his health without taking other precautions such as are usually observed with regard to insurability before issuing a policy. However, it is unnecessary to decide this question if the insurer is precluded from making any defense after the lapse of two years from issuance of the policy other than those defenses named in the statute, viz., non-payment of premiums and violation of the conditions of the policy relating to military or naval service in time of war.

AFFIRMED.

Gridley and Hatchett, JJ., concur.



101 - 25353

GORDON RAMSAY, Administrator
of the estate of ADAM KLAWEKHA,
deceased,

Appellee,

vs.

OLD COLONY LIFE INSURANCE
COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 649

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a suit upon an insurance policy issued by defendant company. It pleaded that the same was null and void because procured upon false and untrue representations with respect to matters material to the risk made by the insured in his application which was a part of the contract. A demurrer to the plea having been sustained on the ground that the suit was not brought within the period of contestability, defendant elected to stand by its plea, and appealed from the judgment against it.

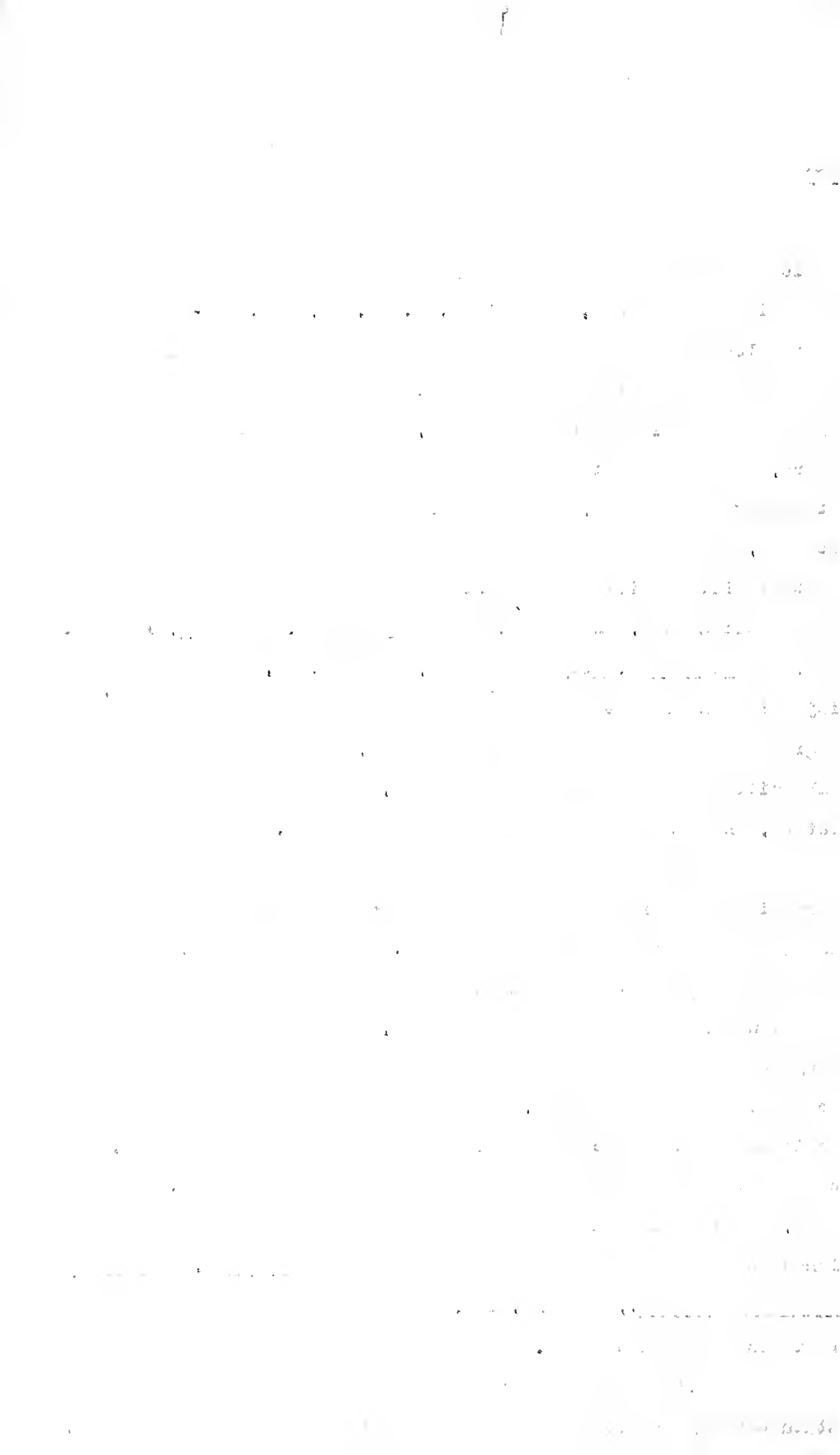
The policy sued on recited that it was "incontestable after one year from the date of issue", which was on September 7, 1916. The insured died April 13, 1917, and proofs of death were duly furnished within 60 days therefrom, but the action was not commenced until November 7, 1918, - more than one year after the death.

Appellant contends that the policy being contestable at the time of the death of the insured, when the cause of action accrued, it remained so, no matter when suit was started. It further contends that notwithstanding the policy named a lesser

period within which a contest may be made than the two years prescribed by statute, (Hurd's A. C. Ch. 73, Sec. 200-a) yet as the language of the policy as to incontestability varies from the provision required by the statute to be inserted in the policy only as to the length of the period, reciting one instead of two years, and was inserted for the purpose of conforming to the statutory requirement, the case calls for the construction of the statute, and urges that if it be so construed that the period of contestability still runs on after the death of the insured such construction will, in the language of People v. Harrison, 191 Ill. 257, and Sturges v. City of Chicago, 237 Ill. 46, "cause great injustice and lead to consequences which are absurd and which the legislature could not have contemplated", and also result in ambiguities as to rights and procedure, violate the legislative intent, and render the statute unconstitutional.

Appellant thereupon proceeds to recite instances of hardships that might result from such construction under which the insurer would be without a remedy. Without discussing them we cannot concede that defendant was without a remedy in equity for fraud in procurement of the policy, although it may be hampered in discovery of the fraud in some instances in time to obtain equitable relief. Nor do we find any ambiguity arises as to the rights or procedure if such construction is adopted, or that it would contravene any constitutional provision. In fact, eliminating such contentions as untenable we deem the language of the Supreme Court in the case of Monahan v. Metropolitan Life Insurance Co., 283 Ill. 136, applicable to the state of facts in the instant case.

While appellee contends that this is not a case of statutory construction because the company voluntarily contracted,



as it might do, for a shorter contestable period than required by statute, yet whether we construe the language of the contract without regard to the statute, or look to the latter with all its intendements, we do not feel at liberty to disregard the language employed by our Supreme Court in the Monahan case, though applied under somewhat different facts. To be sure that case was decided before the passage of the statute, but the provision in the policy in the instant case, namely, "that after one year the policy shall be incontestable" etc., and the language of the statute, "that the policy shall be incontestable after two years from its date" are hardly capable of different meanings as to when the period of contestability begins and ends, unless, as we do not find, other parts of the statute are inconsistent with the specific reference to the date of the policy as the beginning of the contestable period. In fact the language of the statute is more explicit on that point than that construed in the Monahan case.

While in that case also the insured died within the contestable period the court held that it was incumbent upon the insurer either to take affirmative action within such period of time to effect a cancellation or rescission of the policy, or by making a defense to the action brought on the policy within such period.

While that case did not involve the question of fraud, which we think might become ground for such affirmative action, and while, as suggested by appellant, cases may arise causing severe hardships to the insurer if the period of contestability has run before discovery of the fraud, yet as the statute does not include fraud in its exceptions to the limitation of such period, and its language and that of the policy are inconsistent with any other theory than that the period of contestability begins and continues to run from the date of the policy, we find no

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reason for excluding the facts in this case from the operation of the rule followed in the Monahan case.

The company voluntarily fixed a shorter period of contestability than that provided by statute, and we find no valid reason for holding that shortening the statutory period from two years to one can be regarded as against public policy. It was said in the Monahan case that while the period operates like a statutory limitation its purpose was to allow time for the discovery of fraud. We cannot say that one year was too short for that purpose. Such period having run, if the company is thereby deprived of an adequate remedy at law, it can hardly complain of the result of a more liberal contract than the statute required it to make. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

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LOUIS C. ROLLO and CHARLES M.
ROGERS, surviving partners of
ROGERS & ROLLO,
Appellants,

vs.

AUGUST W. MILLER,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

219 I.A. 649

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

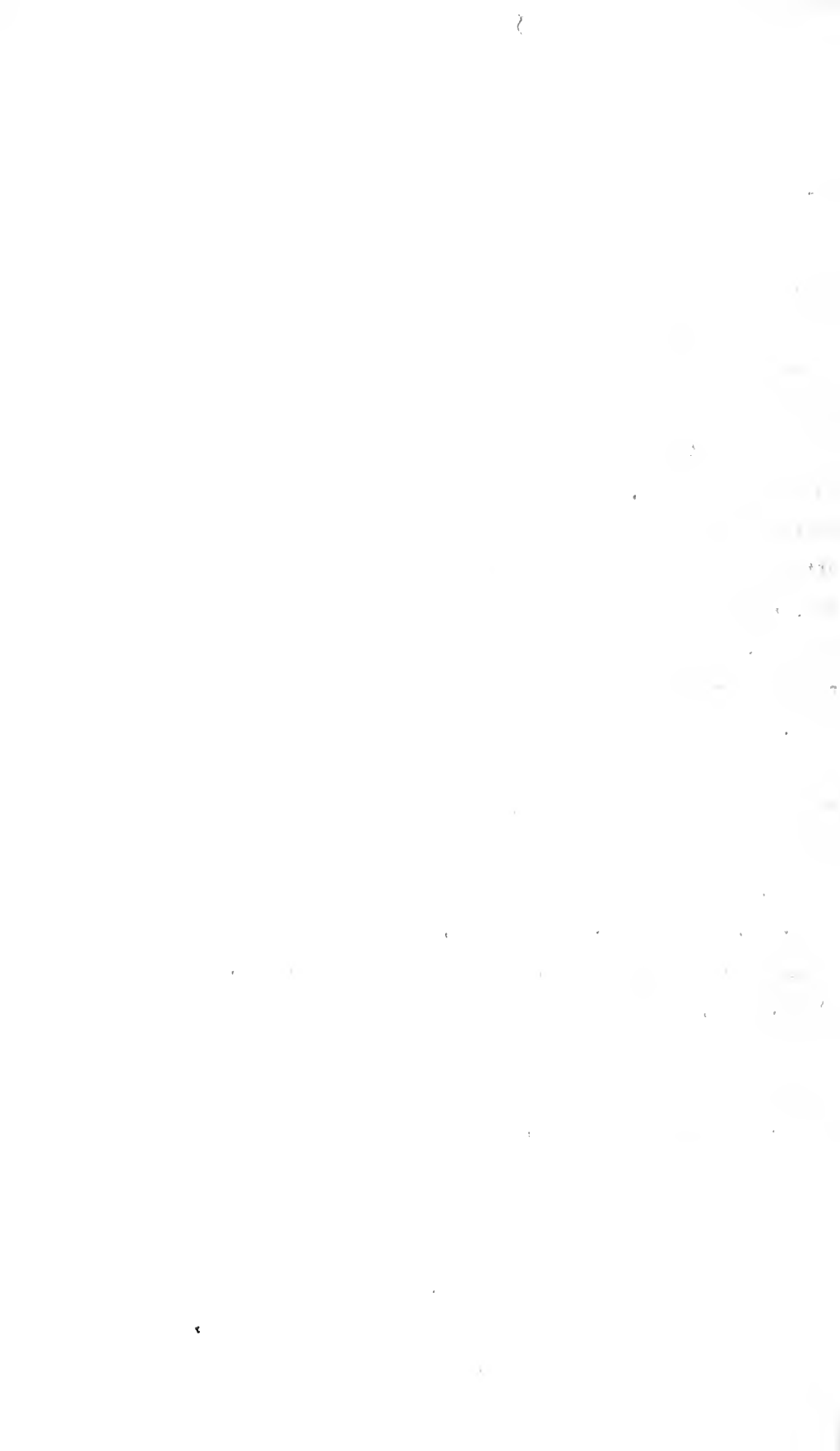
A judgment was entered against appellee on a barr. and cognovit, and allowed to stand as security while opened for defense. Appellee filed the general issue and four special pleas, averring respectively (1) that the note sued on, of which appellee was the maker, was without consideration, (2) that it was an accommodation note not held by appellants in due course for value, (3) that it was given for a specific purpose on condition of no liability of appellee, and (4) that appellants are not holders in due course before maturity for value and took the note with full knowledge of all its infirmities. Replications concluding to the contrary were filed to all pleas except the second and fourth special pleas, and replications averring that the note was accommodation paper given to the payee, A. M. Flint, and endorsed and delivered by him to appellants "in part payment" of a pre-existing debt due from him to the firm of Rogers and Rollo. A rejoinder to the last mentioned replications took issue on the note being "in part payment".

It was conceded at the trial that the note was an accommodation note given by Miller to Flint at the time the

latter was indebted to said firm for more than its amount.

After proof of the note and amount due thereon, and offer of an incompetent letter, plaintiff rested. Defendant's evidence was mainly in support of said rejoinders to the effect that said note was not accepted in part payment of Flint's debt to Rogers & Rollo, and defendant produced the latter's books to show that the full amount of said debt was charged up to him after the giving of said note, without giving him credit therefor, and plaintiff admitted the note was never credited to his account. The proof, therefore, failed to sustain plaintiff's replication to the second and fourth special pleas as to payment.

But there were other issues than that of acceptance of the note in part payment. If the note was taken as security instead of part payment of the debt, as defendants themselves proved, then being for a preexisting debt it was "for value", (Sec. 25, Neg. Insts. Act of 1907, Hurd's *L. & C.*, Ch. 98, 43; Manning v. McClure et al., 36 Ill. 490; Mix v. Nat. Bk. of Bloomington, 91 id. 20); and where accommodation paper is taken "in the normal course of business for value, the maker will not be listened to if he asserts it was without consideration." (Miller v. Larned, 103 Ill. 561, 570.) Hence the plea of want of consideration was not supported. On the contrary defendant's own evidence tended to show that the note was given as accommodation paper and as security for such pre-existing indebtedness to said firm, pursuant to a conversation had with a deceased member of said firm at which Flint, and Rollo, a surviving member of the firm, were present. Mr. Rollo was called by defendant, and testified that he was present when an



arrangement was made between Flint and Rogers, the deceased member of the firm, to the effect that Flint would produce two notes of \$500 each as security for the advance made for him by the firm; and Flint, also called by defendant, testified to having a conversation with the deceased Rogers where the giving of the note was discussed before it was given, and that just before it was given Miller also had a conversation with said Rogers regarding the note, and was with Flint when he delivered the note to said Rogers. While the court properly did not permit either of them to give the conversation with the deceased Rogers, yet there was no contradiction of Pollo's testimony - presented by defendants themselves - which tended to show that notes of \$500 each were to be delivered as security for such debt, and the evidence shows that the note in question for \$500, and another for the same amount, were delivered to said firm, and disclose no other purpose in delivering them. We think there was ample proof, therefore, to show that the note in question was given and accepted as security for such debt, and was thus taken in course for value and therefore supported by a consideration. Hence, we think, the court erred in its findings and in entering judgment for appellee. The judgment for appellee will accordingly be reversed, and as the case was tried without a jury judgment will be entered here on a different finding of facts for the amount of the note with interest at 6% from the date thereof, January 3, 1912, as herein provided, being \$762.50.

REVERSED AND JUDGMENT HERE
FOR \$762.50.

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138 - 25932

* FINDING OF FACTS.

We find that the note in question was executed by appellee and given to and taken in due course for value by the partnership firm of Rogers & Helle, of which appellants are the surviving members, to secure a pre-existing indebtedness from the payee of said note to said firm, which now amounts to \$762.50 and remains due and unpaid.

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163 - 25417

EDWARD MURPHY, Administrator
of the estate of EDMUND QUARRY,
deceased,

Appellee,

vs.

WILLIAM JOHN DANIELS,

Appellant.

2191.A. 649

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

219

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action for damages under the statute for causing the death of plaintiff's intestate, Edmund Quarry. The verdict and judgment were for \$1500. The grounds urged for reversal are mainly technical.

It is first urged that in form the declaration is a personal action for assault. While the declaration recites the fact of an assault by blows and kicks it is plainly predicated on the claim that death was the proximate result of the injuries resulting therefrom, and the evidence clearly sustained the charge that the injuries were the result of a blow. It plainly tended to show that deceased was struck in the face by appellant with sufficient force to fell him to the street, thereby causing a fracture at the base of his skull which resulted in his death. He was taken home in an unconscious state, had convulsions the following day, relapsed into unconsciousness and died the second day after the assault. The attending physician, basing his opinion both upon his own examination and the circumstances of the assault, as testified to and not disputed, testified that death ensued from fracture of the skull resulting from violent contact with the pavement.

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Objection was made and overruled to the hypothetical question put to him, on which such opinion was expressed, on the ground that it ignored that other injuries may have intervened. There was no sound basis for the assumption of such a fact. There was nothing to indicate a break in the sequence of conditions that followed the blow. The evidence supported but one inference - death from fracture of the skull, proximately caused by the blow as aforesaid.

Complaint is made of the court's limitation of the cross examination of the wife of deceased with regard to his health. The question excluded called for a conclusion and not a fact within her knowledge.

Exception was also taken that defendant was not permitted to testify. The case did not come within any statutory exception warranting his right to testify. The widow and minor daughter testified that when deceased was brought home he had a cut on his lip. Defendant offered to testify that he had no cut on his face. But this was quite immaterial so long as the evidence indicated no other cause of death than the fracture of the skull, and the evidence was undisputed that it resulted from a fall caused by a blow, or a "shove" as defendant himself offered to show. The offer rejected also pertained to words had with deceased, and the latter's attitude at the time. But whether testimony on the subject was within the inhibition of the statute or not, it offered no justification for the assault which was the proximate cause of death. Defendant also offered to contradict the testimony of two women to the effect that one of them rebuked him before leaving the scene for making the assault. But a denial of the rebuke had no tendency to refute the controlling fact that defendant without due provocation assaulted deceased and thereby

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caused his death.

It is practically admitted by appellee that it was error to instruct the jury that if the assault was unlawful and caused death the jury might award smart-money or punitive damages. But there can be no doubt of defendant's liability from the uncontroverted evidence. Deceased was 60 years of age and earning a salary of \$18 per week. He left a widow and two minor children, a girl and a boy, 16 and 18 years old respectively. His expectation of life under standard tables of mortality, of which courts take judicial notice, (Marshall v. Marshall, 252 Ill. 568 and cases cited) was some 15 years. The verdict was for \$1500, an amount he would earn in about one year and a half. Upon any fair consideration of the evidence the amount of the verdict could not reasonably have been less. In fact it is so low as to indicate that no prejudice resulted from the erroneous instruction. The court also improperly refused an instruction offered by defendant which stated the proper rule of damages. But when, as here, there is nothing in the record from which it can be seen that the giving or refusing of an instruction will work any injury to the defendant, the giving or refusing of the same is not such prejudicial error as ought to work a reversal of the judgment below. (O'Fallon Coal Co. v. Laquet, 198 Ill. 125, 129; Bettis v. Green, 171 Ill. 495.) Much larger judgments on a similar state of facts have been frequently sustained. In fact, a judgment for a less amount would properly have been set aside.

Claim is made of a variance but there was no reasonable basis for it.

In spite of the conceded errors the judgment should be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

175 - 25430

MARGA ET M. PETERSON,

Appellee,

vs.

EVAR F. PETERSON,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

219 I.A. 650

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting the complainant a divorce from her husband on the ground of extreme and repeated cruelty, and allowing her eight dollars a week permanent alimony. The only question raised is as to the sufficiency of the evidence.

Defendant was his only witness, and while he feebly attempted to explain away some of the charges, and did not deny others, his wife's testimony in support of them was amply corroborated.

The evidence showed the following incidents:

One night in 1917 he came home drunk, entered her bedroom and without speaking to her, turned on the gas without lighting it, and then leaving it in that condition went to sleep in another room. One night in February, 1914, while a fierce storm was raging, he again came home drunk, called his wife vile names and ordered her into the street, telling her that it was where she belonged. In order to reach a place of refuge with her parents she was required to go two miles in the storm at two o'clock in the morning. In 1915 he choked her, leaving visible marks of his violence, threw her on the kitchen table and then threw things at her as she was leaving the room. In

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1917, again coming home intoxicated, he threw the baby's bottle of milk at her and then pushed her over on the broken piece of glass causing her hand to be so severely lacerated and permanently disabled that she is obliged to wear a glove on it to keep the exposed nerves in her fingers separated. In 1918, during a quarrel that caused their final separation, he threatened to leave her and take the baby with him, and at the same time presented a gun to her, calling attention to the fact that it was loaded and threatening to shoot her if she followed him.

We cannot agree with appellant's contention that evidence disclosing such conduct does not show repeated acts of physical violence, two of which at least, are clearly so and the other two even more aggravated in character. Similar acts of physical violence have frequently been held to constitute extreme and repeated cruelty within the meaning of the statute, when taken in connection with other acts incompatible with harmonious married life, especially when indicating a temperament capable of resorting to homicidal means to end it. The subject has undergone so much judicial discussion we need not refer to authorities, nor attempt to enlarge upon obvious conclusions. There was sufficient corroborative proof of these acts, or most of them, and evidence on which to base the allowance of alimony.

AFFIRMED.

Gridley and Matchett, JJ., concur.

193 - 25448

THOMAS O'BRIEN,

Appellant,

vs.

EDWIN ANDA,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

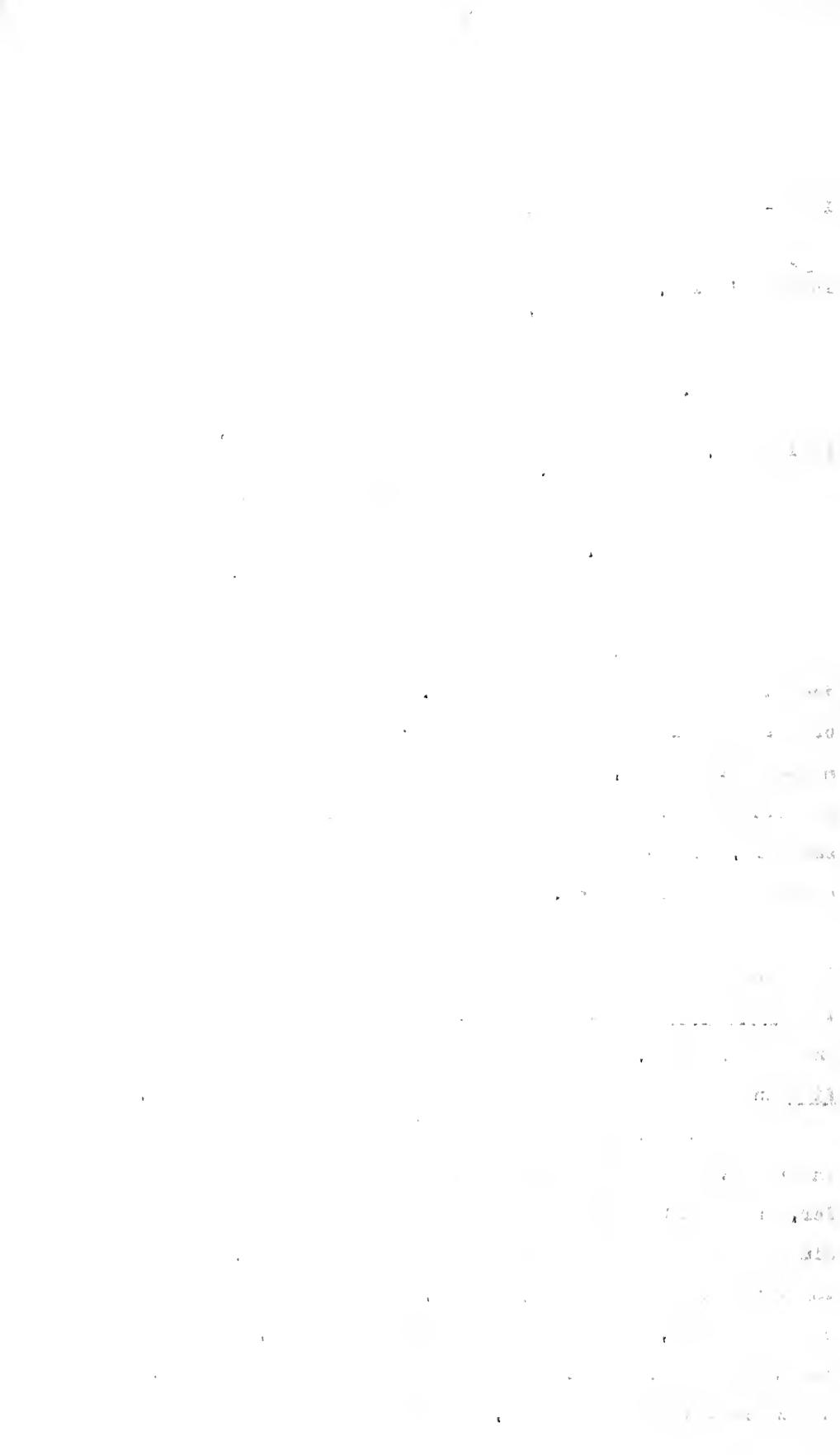
219 LA 650

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant brought suit for a balance claimed to be due on hay sold by him to appellee. Appellee denied the contract of sale pleading that the sum due was upon a sale made by him on a commission basis, for which he remitted to appellant by check reciting that the same was in "full payment" of the hay received and sold, and that the retention of said check constituted an accord and satisfaction.

Appellant concedes it to be the law that acceptance in full payment of a lesser amount than that claimed where there is a bona fide dispute or honest difference constitutes an accord and satisfaction, but urges that whether the dispute was a bona fide one was a question of fact for submission to the jury.

The evidence discloses that after the hay was shipped and received appellee claimed it was not of the quality bargained for, and that he sent word to appellant that unless he heard from him to the contrary he would sell it on commission, and not hearing from him in the time specified, sold the hay and sent a check therefor, less expenses and his commission, on the back of which was written "in full payment of the hay received." Appellant returned the check, refusing to accept it as full pay-



ment and threatening suit if the entire amount covering the contract, as contended for by him, was not made within three days. Two days later appellee sent the check back with the statement that if appellant did not want to accept it in settlement he "would have to let the court decide". Appellant kept the check, had it certified, brought suit the following month and after it was begun and before trial had the check cashed.

There can be no ground for any inference from such testimony than that appellant knew when he kept the check and had it certified that it was tendered on condition that it be accepted in full payment of his claim. Under such circumstances there can be no doubt that it constituted an accord and satisfaction if there was a bona fide dispute or honest difference between them as to the amount due. That there was such a dispute when the check was so tendered and retained is, in our opinion, clearly indicated by both the pleadings and the evidence. What were the merits of that dispute is not questioned nor the test of its existence.

Looking to the pleadings it appears that appellant based his claim on an absolute sale of the hay to appellee, which the latter denied, claiming that while he received the hay it was sold upon a commission basis and that the retention of the check as aforesaid tendered "in full payment" constituted an accord and satisfaction. The evidence on this issue further discloses the same attitude of the parties with respect to the nature of the contract between them and the amount due under the transaction at and before the time of tendering the check. The undisputed correspondence between them as to their differences supported no other inference than that appellee deemed his obligation was changed to a commission basis whatever may have

been the original agreement between them. If so, there was an unquestioned dispute of appellant's claim which authorized the directed verdict, for there could be no question of the existence of such a dispute as required appellant, who certainly understood that the check was tendered on the condition that it be accepted in full payment of his claim, to return the same if he did not wish to accept the condition on which it was tendered. The law in such a case is fully considered in Ostrander v. Scott, 161 Ill. 339; Lynn v. Smith, 183 id. 179; Canton Union Coal Co. v. Parlin & Orendorff Co., 215 id. 244, and Snow v. Grigsheimer, 220 id. 166, and hence need not be further discussed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

25482
235 - 25482

SEAMAN PAPER COMPANY,
a corporation,
Appellant,

vs.

AMERICAN ENVELOPE COMPANY,
a corporation,
Appellee.

ADJUD. DIV.

COUNTY COURT,

COOK COUNTY.

219 I.A. 650

MR. JUSTICE JUDITH BARNES
DELIVERED THE OPINION OF THE COURT.

By written agreement, dated October 28, 1916, appellant, a dealer in paper, agreed to sell, and appellee, a manufacturer of envelopes, agreed to buy, a specified quantity of described paper for monthly deliveries between March 1 and August 31, 1917, at the stated price of $4\frac{1}{2}$ cts. per lb. "net thirty (30) days from date of invoice". Shipments were made accordingly, beginning in March, 1917, and continuing monthly until the full quantity sold and requested was delivered. Invoices reciting said terms, "net thirty (30) days", were rendered at or about the time of each shipment, and at the end of each month appellant sent appellee a statement summarizing the various invoices sent during that month. The March and April invoices were paid in full. From those sent after that time appellee deducted 3 per cent as a discount and remitted the balance. Appellant regularly returned a bill for the deduction, stating the "terms were net, net 3 per cent 30 days". On failure at close of contract to remit for these deductions aggregating \$954.12, the unpaid balance of the invoices and at the contract price of the paper, this suit was brought to recover the same based upon the common counts, to

which defendant filed the general issue and a special plea setting up the double and inconsistent defense that plaintiff obtained the contract by fraudulent representations and failed to perform a verbal promise, and that defendant relied on both in executing the contract.

The false and fraudulent representation pleaded is that all other envelope manufacturers purchasing paper of the same quality from plaintiff "were contracted to and were paying for the same on a net basis, without terms of discount"; and the unfulfilled promise, as alleged, is, "that if the defendant would enter into the contract as written, and it afterwards ascertained the fact to be that any other envelope manufacturers, purchasing the paper in question, were being allowed terms of discount, then and in that event, defendant would be allowed the regular 3 per cent discount."

The court overruled demurrers, general and special, to said plea, and plaintiff having pleaded over error is assigned in the failure of the court to direct a verdict for plaintiff on its motion, and in refusing certain tendered instructions.

Proper pleading would have obviated consideration of elementary questions discussed in the briefs at unnecessary length. The plea on its face shows the verbal promise relied on was made during the negotiations, hence "with all previous conversations relating to the subject matter" it was "merged in the written contract." (Grubb v. Wilson, 349 Ill. 456, 463.) And it is elementary that defendant could not rely on a mere promise as a false representation, so that proof of the alleged unfulfilled promise had no bearing on the real issue in the case of fraudulent representation. (Id.)



But as such promise was erroneously made one of the issues the jury should have been instructed as to the law thereon, which was embodied in refused instruction No. 5 tendered by plaintiff to the effect that such a promise did not amount in law to fraud, although the promisor at the time of making it did not intend to perform. Inasmuch as the party negotiating for the defendant company testified that he relied on said promise it was reversible error to refuse this instruction.

Perhaps other refused instructions were not sufficiently covered by those given, but we need not discuss them.

As to the evidence. It is questionable whether in view of the indefinite testimony as to what period of time was covered when plaintiff's agents made the statement that plaintiff was not allowing a discount to other manufacturers, testimony of its allowing discount on contracts made in the previous months of June and July was admissible.

And it is also doubtful whether the evidence adduced was sufficient to constitute fraud, and whether what was claimed as such was not mere "dealers' talk".

Nor was there adequate proof of damage. The evidence is susceptible of construction that defendant was not injured because it could not have obtained a more favorable contract elsewhere. The test of damage on account of fraud and deceit, the real ground of action, was not what defendant would have saved if the alleged unfulfilled promise had been performed. But no instructions seem to have been offered on the subject.

Believing it likely that before another trial the pleadings will be adjusted on principles of law not open to question we refrain from further allusion to the evidence. A new trial should have been granted; but we cannot give plaintiff judgment here as

it requests. (CITY OF SPRING VALLEY v. SPRING VALLEY ROAD
Co., 173 Ill. 407.)

APPROVED AND FORWARDED,

Gridley and Hatchett, JJ., concur.

265 - 25524

GORDON A. RANSAY, Administrator
of the estate of NORMAN GIBSON,
deceased,

Appellee,

vs.

WISCONSIN STEEL COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 650

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The only question that need be considered on this appeal is whether the verdict against defendant for \$10,000 damages on the charge of negligently causing the death of appellee's intestate, Norman Gibson, was not manifestly against the weight of the evidence, both as to the charge and the claim of exercise of due care for his own safety.

Deceased was in appellant's employ as second mate of a freight boat carrying ore. While it was being unloaded he fell or was swept into one of its empty holds by the hoisting bucket - called the "clam" or "clam-shell" - which together with the cage that contained the operator of the machine moved on a trolley underneath the beam or boom of a crane. The boat lay with its starboard side next to the dock. The crane ran on rails parallel to the boat, and the beam underneath which the "clam-shell" and cage moved extended across the boat directly over the particular hold that was being unloaded. The movement of the cage and "clam-shell" was by means of electric power controlled by the manipulation of levers in the cage. In the successive movements the "clam" moved along under the beam, was lowered into the hold, grabbed a bucket of ore, was then lifted and moved back along the beam to be emptied on the dock. It

usually took about three grabs of ore every two minutes, but the particular speed of operation in the present instance was not shown. When a hold was emptied the crane was moved opposite another hold for the same operation.

While there was no eyewitness to the happening of the accident, and it is stoutly insisted by appellant that the proof is insufficient to show that it happened from the "clam-shell" striking the deceased in such movement, yet assuming that the accident was caused by his being so struck we think the evidence fails to establish the negligence charged, and affirmatively shows contributory negligence on the part of deceased.

The boat was divided into four compartments of seven holds each which ran across the boat. They were 30 feet long, 9 feet wide and 25 feet deep, separated by a space and cross beam about 2 or 3 feet wide over which one could pass from one side of the boat to the other. They were numbered from the bow 1 to 30 respectively. The first notice of the accident was when after taking the last grabful from hold number 7 the operator while passing the "clam-shell" and cage over it again, as he always did, in order to get his bearings for "spotting" or placing the machine opposite the next hold to be emptied, saw Gibson lying in hold number 7. If, as may be assumed, deceased was swept into the hold by this last movement it was in the course of a customary operation with which he must have been familiar.

At the time the accident happened all of the holds of the front compartment, including number 7, had been emptied and their hatches were still off. When Wolf, the operator, saw from his cage the body of Gibson lying in hold number 7 he suddenly stopped the movement and, motioning to the wheelman Evans, who stood near hold number 26, pointed into number 7, to which Evans then went. A short time before this Evans had spoken

to Gibson about pulling on the hatches over holds in the front compartment. Gibson replied that he would wait until the entire compartment was emptied. When Evans last saw Gibson before the accident the latter was getting ready to pull on the covers and was standing on the starboard side of the boat near the dock opposite hold number 7.

Evans and Wolf were the only witnesses. They were both called by plaintiff. Evans testified, and it was not disputed, that it was a general rule that a member of the crew never goes on the side next to the dock where they are working, that it was forbidden to go on that side, and that there were signs on the boat, which were removed when the hatches were being put on, giving notice to that effect. Whatever had been deceased's previous experience it appeared that he had been on the boat that year from April to November, the month in which the accident happened, and that he had charge of the watch on that occasion and was the only person at the time on deck in that part of the boat. If he was pushed into the hold while standing on the dock side of the vessel in a position where he might be struck by the passing "clam-shell", with whose movements the very nature of his duties made him familiar, he not only was violating a rule of which said signs gave him notice, but cannot be said to have been exercising due care for his own safety, and was unquestionably guilty of contributory negligence.

Nor is any charge of negligence sustained by the proof. There was no evidence to sustain the charge of negligent construction, or negligence in failure to warn Gibson of the approach of the "clam-shell". The crane and "clam-shell" could be seen from every part of the deck, and certainly defendant was under no legal duty to warn Gibson of an obvious ^{danger} incident to the work with which he must have been acquainted, and that

he was violating a rule which it was seemingly his duty at the time to enforce. It appears, too, that the operator could not see deceased from his cage while the latter stood opposite it on the dock side of the boat, where unquestionably he had no business to be, and where in the performance of his duty he would not be expected to be. The proof was insufficient to establish any of the charges of negligence, and there was no proof to show that there was a mere practical construction of the machine or method of operating it.

Defendant offered no evidence and at the conclusion of the evidence asked for an instructed verdict, which we think should have been given. At any rate the verdict is against the manifest weight of the evidence, a question necessarily preserved by the refusal to grant such motion.

Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley and Matchett, JJ., concur.

265 - 25524

FINDING OF FACT.

We find that appellant, Wisconsin Steel company, was not guilty of negligence as charged in the declaration, and that the deceased, Norman Gibson, was guilty of contributory negligence which proximately caused his death.



337 - 25597

ARTHUR D. LORD,

Appellee,

vs.

STANWOOD, TAYLOR & COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

219 T.A. 651

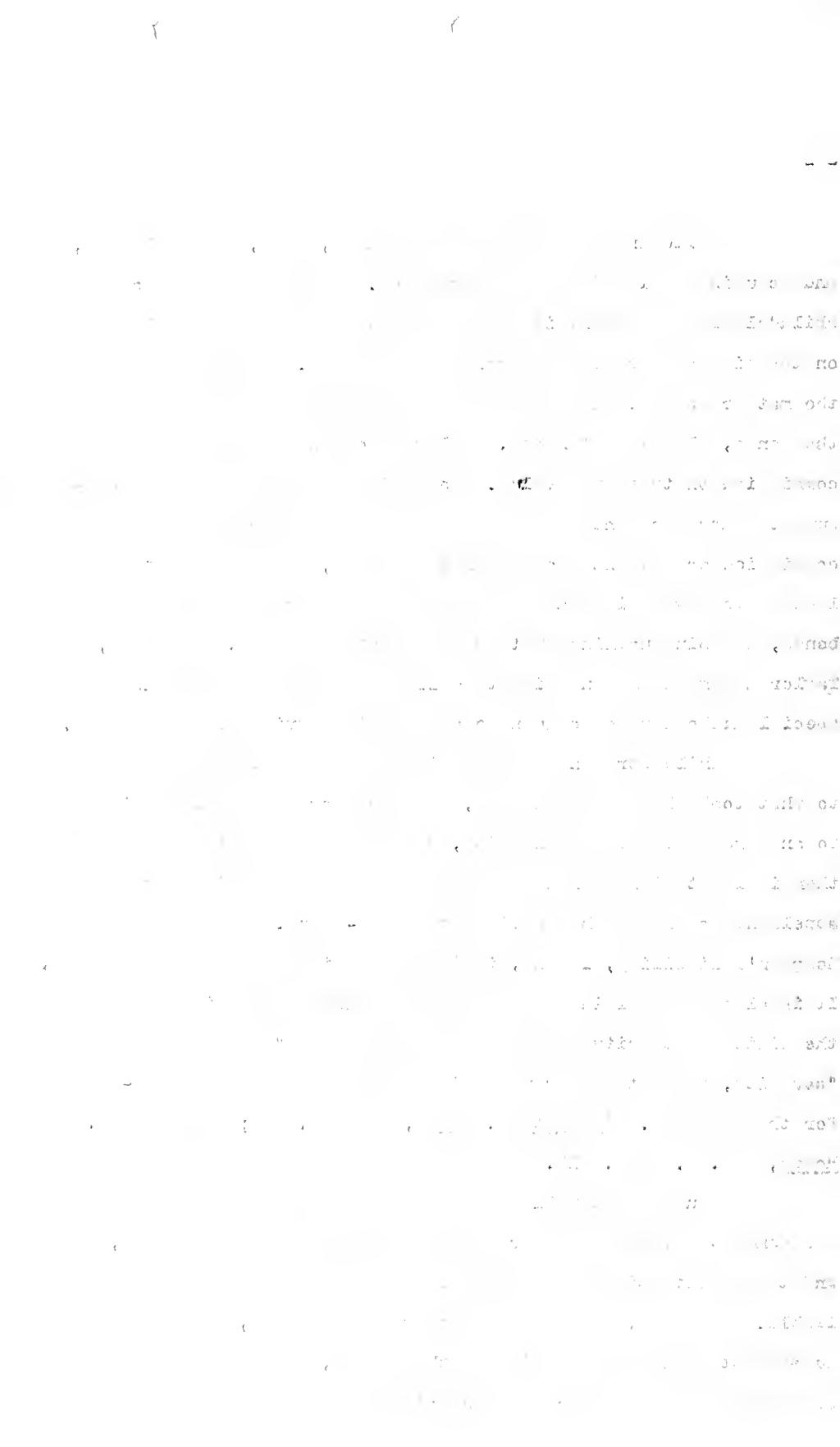
Plaintiff Lord brought suit against appellant and Edwin Smith Hodgman on the common counts, an account stated, and a special count for work and services in and about the selling for the Old Ben Coal Company its bond issue of \$750,000. Judgment was rendered against them on a finding by the court.

The evidence shows that defendant Hodgman was in the employ of co-defendant Stanwood, Taylor & Company, of Chicago, a dealer in investment securities, and that in such of its transactions as he took part he received a certain percentage of the profits, but had no general authority to act for it, each transaction standing "on its own bottom" with reference to terms and his authority therein. It appears that he was authorized to continue negotiations, already begun by the vice president of the company, to effect a sale of said bonds to a Chicago firm. But he abandoned them, going to New York city for some purpose. While there he received a letter from the company stating that the Chicago firm had declined to purchase and adding "you are therefore to offer this proposition wherever you see fit." This was the only express authority given to him in the matter beyond his specific authority to negotiate with the Chicago firm, and the record discloses nothing in their relations or conduct, before or afterwards, from which any implication as to its extension or enlargement would arise.

While in New York he met appellee, Lord, also a broker, and acquainted him with the proposition. On his starting to Philadelphia to present it there Lord suggested that he call on the firm of Cassatt & Company of that city. Hodgman presented the matter to that firm and it subsequently closed a deal for the bonds, allowing Stanwood, Taylor & Company one per cent commission on their par value. Some time after the deal was consummated Lord presented a claim to the latter company for a commission or compensation for his services, which were entirely limited to suggesting Cassatt & Company as a customer for the bonds, he doing nothing further to promote the sale. Stanwood, Taylor & Company had no direct dealing with Lord and gave no special authority to Hodgman to employ his services in the matter.

While Lord and Hodgman differed somewhat with respect to what took place between them, on which Lord bases his claim to an agreement for compensation, yet what was said or done between them is immaterial so long as Hodgman was not authorized by appellant to engage the services of a sub-agent. Whatever may be Hodgman's liability, if any, it is not a joint one with the company. It is almost too plain for argument that under such circumstances the limited authority to "offer the proposition" wherever Hodgman "saw fit", did not confer upon him authority to employ a sub-agent for that purpose. (Doggett v. Green, 254 Ill. 134; Bondwell v. Howes, 2 N. Y. Supp. 717.)

Equally untenable are the contentions of appellee that the company ratified the arrangement between Lord and Hodgman, and that a retention of the benefits of the transaction renders it liable. Stanwood, Taylor & Company cannot be held, without some subsequent affirmative action on their part, to have ratified that of which they had no knowledge until after the consummation of the



deal. While Hodgman subsequent thereto took up with the company the matter of Lord's claim it never expressly or impliedly recognized the same or his authority to enter into it, and having made no contract with Lord it was not bound by its silence and disregard of his claim. But, as said in Carroll v. Tucker, 21 N. Y. Supp. 952, quoting from 1 Am. & Eng. Enc. of Law, 395: "Where the sub-agent has been employed without authority, and his acts are afterward ratified, he can recover no compensation from the principal but must look to the agent."

The company's deal with Cassatt & Company being utterly distinct and separate from any unauthorized arrangement Hodgman may have made with Lord, the doctrine of liability from retention of benefits of the transaction has no application here.

Nor can the latter recover on the theory that he was the procuring cause of the sale. His mere suggestion of Cassatt & Company as a probable purchaser did not entitle him to a commission (Rees v. Spruance, 45 Ill. 308, 311) and cannot be deemed the efficient, procuring cause of the sale.

It therefore follows that there being no liability on the part of Stanwood, Taylor & Company, the judgment must be reversed, and, as the case was tried without a jury, a judgment entered here with a finding of facts different from those impliedly found by the court below.

There is no evidence on which to base a claim under the common counts or a stated account.

REVERSED WITH FINDING OF FACTS.

Gridley and Matchett, JJ., concur.

337 - 25597

FINDING OF FACTS.

We find as ultimate facts that there was no contract, express or implied, between appellant, Stanwood, Taylor & Company, and appellee, Arthur D. Lord, and no contract between the latter and co-defendant Edwin Smith Hodgman, to which said appellant was a party, and no ratification by the latter of any contract between said Lord and said Hodgman, and no stated account between said Lord and said Stanwood, Taylor & Company, and that said Hodgman had no authority from said Stanwood, Taylor & Company to enter into a contract with said Lord for the latter's services in and about the sale of the bonds in question, and that said Lord was not the efficient or procuring cause of said sale.

123 - 124

[Faint handwritten notes]

$$f(x) = \begin{cases} 1 & \text{if } x \in \mathbb{Q} \\ 0 & \text{if } x \notin \mathbb{Q} \end{cases}$$

232 - 25489.

Dr. JOSEPH B. DeLEE,

Appellant,

APPEAL FROM

v.

MUNICIPAL COURT

OF CHICAGO.

MRS. T. J. HYMAN,

Appellee.

219 I.A. 651

MR. JUSTICE GRIDLEY delivered the opinion of the court.

On January 6, 1919, plaintiff, a physician, specializing in obstetrics and gynecology, brought suit in the Municipal Court of Chicago against defendant to recover for the reasonable value of medical services rendered to defendant's married daughter, Mrs. Paul Purnell, during the months of September and October, 1917, at defendant's request. The cause was heard before the court without a jury. No evidence was introduced by defendant. After hearing plaintiff's evidence the court, on defendant's motion, found the issues against plaintiff and entered judgment against him for costs, from which judgment he appealed.

From the testimony of the plaintiff and three other witnesses called in his behalf the following facts in substance appear: In September, 1917, Mr. Paul Purnell called Dr. Arthur Loewy, a physician residing in Oak Park, Chicago, to attend his wife, who was in an advanced stage of pregnancy. While Dr. Loewy was attending her in the West Suburban Hospital in Oak Park, she developed kidney trouble and her condition became serious. About this time Dr. Loewy had a conversation at night over the telephone with his patient's mother, the defendant. He detailed his patient's serious condition and what probably would have to be done, and said that he desired to call another physician, Dr. DeLee, if his services could be procured. To this statement the defendant replied in substance: "All right; go ahead; spare no expense; get the best physician you possibly can." On the following day at the hospital Dr. Loewy had another conversation with the defendant, at which he again spoke of the serious condition of his patient and the probable outcome of the case. The defendant said "that

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she and Mr. Hyman would have to stand back of the young people in this instance." On the same day Dr. DeLee, residing at 5028 Ellis Avenue in the south part of Chicago, and having been summoned by Dr. Loewy, called at the hospital and had a conversation with defendant, during which the latter said: "Doctor, I want you to leave no stone unturned; I want you to leave nothing undone to safeguard my daughter." Plaintiff thereupon went up to Mrs. Purnell's room and examined her. After the examination plaintiff had another conversation in the corridor with defendant, at which Dr. Loewy and Mr. Purnell were present. Plaintiff detailed to defendant the very critical condition of Mrs. Purnell, and suggested that she be removed to the Chicago Lying In Hospital, on the south side of Chicago, in order that plaintiff might give her more attention than he could if she remained in the West Suburban Hospital, which was far removed from plaintiff's circle of work. To this suggestion defendant assented and further said: "I don't want you to leave anything undone that will preserve my daughter." Mrs. Purnell was removed to the hospital mentioned, and on her entry defendant, although there were other rooms to be had, selected the most expensive room, and again told plaintiff that he should "leave nothing undone" and should give her daughter the "best of all possible medicines." Plaintiff's testimony further disclosed that he there attended and treated Mrs. Purnell many times, and that, though the case presented many complications, he was successful in his efforts and that the lives of both mother and baby were saved. There was also testimony to the effect that the usual and customary fee at the time for such specialist's services as were rendered by plaintiff was at least \$1000, and that plaintiff had submitted a bill for \$750, which remained unpaid.

In 21 Ruling Case Law, p. 412, sec. 55, it is said: "The general rule, that where a person requests of another the performance of services the law implies a promise to pay the reasonable value of the services performed, has no application in the case of a physician rendering professional services to a third person, if the relation to the patient of the person who requests the services is not such as

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imports the legal obligation to provide them. The authorities generally support the broad proposition that a mere request by one person to a physician to render services to another to whom the person making the request is under no obligation to furnish medical care raises no implication of a promise to pay for the services. x x Accordingly, it has been held that a physician may not recover from a parent for services rendered to an adult daughter at the request of the parent." These principles are sustained by the following cases: Boyd v. Sappington, 4 Watts (Pa.) 247; Crane v. Baudouine, 55 N. Y. 256; McGuire v. Hughes, 207 N. Y. 516. It is further said in the text book mentioned (p. 413): "However, medical service requested by one person in behalf of another and furnished to that other often gives rise to a contract implied in fact between the physician and the person requesting the service. x x For example, although a promise to pay a physician for his services is not implied from the mere fact that a father calls him to attend his sick son, who is a man of mature age, yet, if the circumstances or conditions are such as to lead the physician to believe that the father is undertaking to pay for the services to be rendered and to charge the father with knowledge thereof, he is liable under an implied contract." (Citing, Morrell v. Lawrence, 203 Mo. 363). In the Morrell case, the court says (p. 373): "We do not go with the counsel to the extent of holding that a father calling a physician to attend his adult son can be rendered liable only on an express contract, because we hold that the circumstances or conditions may be such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered. Whilst the calling of a physician to the bed side of a sick man has in the nature of the case its own elements of exception to the general rule, yet it is not put so far in a class by itself as to exempt it entirely from the category of implied contracts. Whether the facts of a case are such as to present a question of whether or not

a contract may be implied is sometimes a question of fact and sometimes one of law; if in the facts relied on, taken as true, there is nothing to justify the inference the court will so decide as a matter of law, but if they are such as that if credited the inference might or might not legitimately be drawn it is a question of fact." In Smith v. Watson, 14 Vt. 332, a physician sought to recover of a brother of an insane person for medical attendance and services rendered the latter at the request of such brother. The court says (p. 337): "It appears that all the services, for which the plaintiff brings this action, were performed for the brother of the defendant, who, though insane, was liable therefor. The present defendant can only be made liable on an original undertaking. The services were not beneficial to him, and he was under no legal obligation to pay for them, unless upon an express undertaking, or unless it may be fairly inferred from the evidence that it was the intention of both parties that the plaintiff should perform the services and the defendant should pay him therefor." In Dorion v. Jacobson, 113 Ill. App. 563, Jacobson, a physician and surgeon, sued Dorion for professional services rendered in the performance of an operation for the removal of a tumor from the abdomen of the wife of Dorion's son. In the trial court, a jury found the issue in favor of the plaintiff and he had judgment for \$400. The Appellate Court for the Second District, however, under the particular facts, reversed the judgment and remanded the cause. The court says (p. 568, italics ours) "The relation of appellant to Mrs. Dorion was such that something more than a mere request to appellee to render the services was necessary in order to bind appellant. He was under no legal obligation to provide or pay for medical attendance to Mrs. Dorion, and in her husband's absence his consent to the performance of the services, or even a request therefor, unless accompanied by a promise to pay for them, upon the faith of which the services were rendered and but for which they would not have been rendered, would not authorize a recovery. x x No particular

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form or set of words is required in such cases, but it must appear that a party occupying such relations as appellant occupied toward Mrs. Dorion, requesting or acquiescing in the services of a physician, said or did that which reasonably indicated an intention to pay for them, and that it was so understood by the physician, and for that reason the services were rendered."

Under the facts of the present case, as disclosed from the testimony of plaintiff's witnesses, and in the light of the above authorities, we are of the opinion that the trial court was not warranted, at the close of plaintiff's case, in finding the issues against plaintiff, and erred in entering a judgment against him. We think that plaintiff made out a good prima facie case of liability on the part of Mrs. Hyman for the reasonable value of plaintiff's services rendered to her daughter, who was married and living with her husband, Mr. Purnell. While plaintiff's evidence does not disclose that Mrs. Hyman expressly promised to pay plaintiff for the services to be rendered by him, we think that from the evidence of what Mrs. Hyman said and did and other evidence, as said in Smith v. Watson, supra, "it may be fairly inferred x x that it was the intention of both parties that the plaintiff should perform the services and the defendant should pay him therefor."

The judgment of the Municipal Court is reversed and the cause is remanded.

REVERSED & REMANDED.

BARNES, P. J., and MATCHETT, J., concur.

241 - 25498

GEORGE MERIDITH, administrator
of the Estate of Kate Meridith,
deceased,

Appellant,

v.

CHICAGO RAILWAYS COMPANY,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

219 I.A. 651

MR. JUSTICE GRIDLEY delivered the opinion of the court.

In an action brought by plaintiff, as administrator, against defendant to recover damages for the alleged wrongful death of Kate Meridith, the jury returned a verdict finding the defendant not guilty. Judgment in favor of the defendant followed and plaintiff appealed.

The accident happened between 7 and 8 o'clock on the evening of June 22, 1917. The deceased was struck by an electric street car, owned and operated by defendant, on Milwaukee avenue near the intersection of Talman avenue in the city of Chicago. Plaintiff charged in separate counts of his declaration: (1) general negligence in the operation of the car, (2) negligently running it at a high and dangerous rate of speed, and (3) negligently failing to ring a bell. The main defense was that the deceased was guilty of such contributory negligence as barred a recovery.

Milwaukee avenue runs in a northwesterly and southeasterly direction. Defendant operated its street cars thereon on double tracks - the cars moving southeasterly being run on the right hand track. Talman avenue, a north and south street, enters Milwaukee avenue from the north, but does not extend south therefrom. Attrill street enters Milwaukee avenue from the southwest, but does not extend northeast therefrom. Frances Place, a north and south street, enters Milwaukee avenue from the south, but does not extend north therefrom; it is the next street southeast of Attrill street entering Milwaukee avenue. Attrill street is a short distance northwest of the west line of Talman avenue extended across Milwaukee avenue,

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and Frances Place is a longer distance southeast of the east line of Talman avenue likewise extended.

The deceased started from the northeast corner of Milwaukee and Talman avenues to cross Milwaukee avenue. She went "slant-wise" towards Frances Place, but not on a cross-walk. When she reached the last rail of the second track she was struck by a street car moving in a southeasterly direction and received injuries resulting in her death. There was evidence tending to show that before attempting to cross the second track she did not look to see if a car was approaching from the northwest; that had she looked she could have seen it; that before she reached the second track the motorman rang his bell and applied his brakes; but that deceased gave no heed and continued to advance immediately in front of the on-coming car.

Counsel for plaintiff urges as grounds for a reversal of the judgment: (1) The giving of instruction No. 2, offered by defendant, and (2) allowing to remain in evidence the answer of the motorman of the car to a question which clearly called for his mere conclusion.

Substantially the same instruction has been approved by reviewing courts of this State. The point made is that it is framed on the hypothesis that deceased saw the car approaching, while the evidence discloses that she evidently did not. Even granting the point it does not follow that the judgment should therefore be reversed. After a careful examination of the entire record we think that the jury could not reasonably have rendered a verdict other than they did because of the evident contributory negligence of the deceased; that upon another trial the verdict must inevitably be the same; and that substantial justice has been done. Under such circumstances a judgment will not be reversed because of possible error in an instruction, or because of error in the admission

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of improper testimony which could not have influenced the verdict.
(Greenup v. Stoker, 3 Oilm. 202, 216; Hewitt v. Jones, 72 Ill. 316, 221;
Feitel v. Chicago City Ry. Co., 113 Ill. App. 381, 393; Gothemann v.
City of Chicago, 263 Ill. 292, 295).

The judgment is affirmed.

AFFIRMED.

BARNES, P. J., and MATCHETT, J., concur.

250 - 24508

JAMES A. MURPHY,

Appellee,

vs.

CITY OF PARK RIDGE et al.,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 651

STATEMENT OF THE CASE. This is an appeal from a judgment of the circuit court of Cook county, entered May 30, 1919, awarding a writ of mandamus against the defendants, City of Park Ridge, its mayor, its city clerk and its six aldermen, commanding them and each of them to proceed without delay, to cause to be collected certain unpaid installments of special assessments against private property, aggregating \$3,766.96, and levied, assessed and confirmed in special assessment No. 29 of the Village (now City) of Park Ridge, in the county court of Cook county, and further commanding them and each of them to include in the appropriation bills and tax levy ordinances for each of the years 1919, 1920 and 1921, an item of \$755.26, being one-third of several sums of money, with interest thereon, levied, assessed and confirmed against said Village (now City) in said assessment proceeding, to the end that the assessments levied and confirmed against said Village (now City) may be paid by said City in three annual installments.

The petition for the writ was filed on December 26, 1918. It is therein alleged in substance that petitioner is a resident of the City of New York; that on February 3, 1894, the president and board of trustees of the Village of Park Ridge passed an ordinance for the grading, graveling, etc., of portions of Main street and Courtland, Vine and South Prospect avenues, in said Village; that the ordinance provided that the improvement should be made, and the cost paid for, by special assessment, in

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accordance with the provisions of Sections 18 to 51 inclusive of Article 9 of the Cities and Villages Act of 1872, and in accordance with an act authorizing the division of special assessments into installments and authorizing the issuance of bonds to anticipate the collection thereof, approved June 17, 1893; that the ordinance divided the assessment into seven installments, the first to be payable from and after the confirmation of the assessment, and the remaining six annually thereafter and bearing interest at 6 per cent per annum; that on February 27, 1894, the Village filed its petition in the county court of Cook county for the levy of a special assessment (No. 29 of the Village of Park Ridge) to pay the cost of said improvement; that thereafter such proceedings were had that an assessment roll was filed therein and the assessment confirmed by a judgment entered May 5, 1894; that on September 7, 1894, the Village passed an ordinance for an issue of bonds, to anticipate the collection of the second and succeeding installments of said assessment, to the amount of \$2,200 against each of the six deferred installments, said bonds to bear interest at 6 per cent per annum, payable annually, but which should not be issued or dated before September 10, 1894, being more than 90 days after the said installments out of which said bonds were payable began to draw interest; that said ordinance provided that said bonds should not exceed in the aggregate the amount of the deferred installments, should be divided into as many series as there were deferred installments, and should have coupons attached to represent the interest to accrue thereon, and that the Village might redeem the bonds at its option at the time of any annual payment of interest, on 20 days' notice being given in a designated newspaper; that by said assessment the Village of Park Ridge was assessed (with other amounts of money not now in question) on the 6th and 7th installments, for lots "A" and "C", the sum of \$124.25, and for

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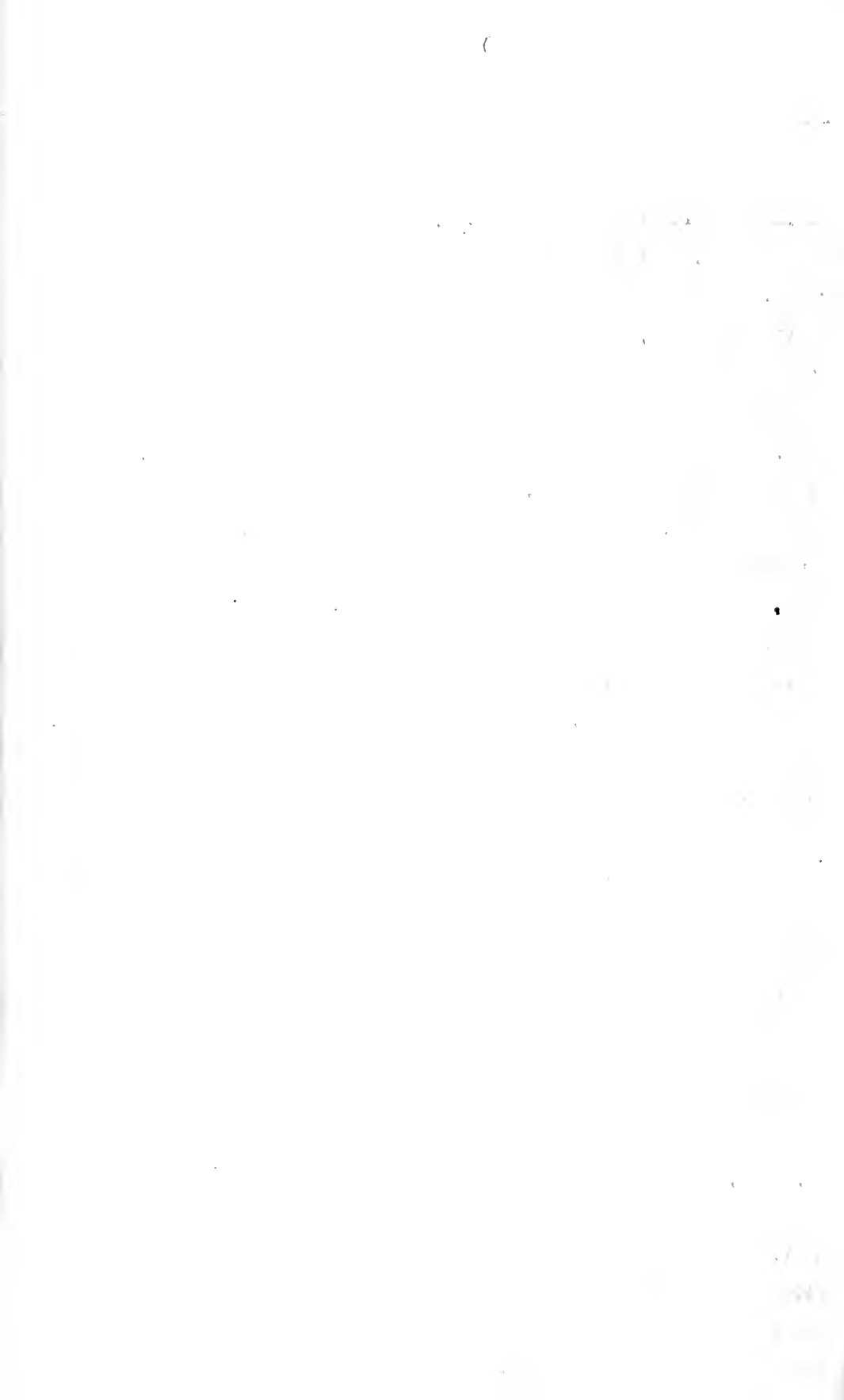
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public benefits the sum of \$310.90, or the total sum of \$435.15 on each said installment; that no appropriation for the payment of said sums with interest has ever been made by said Village, or by its successor, the City of Park Ridge, and that said sums of money with interest are still due and unpaid by said City; that petitioner is now the legal holder and owner of six bonds for \$500 each, and of two bonds for \$100 each, all dated September 20, 1894, all issued by said Village, drawing interest at 6 per cent per annum and all unpaid; (The number and series of each bond, the installment out of which it is payable, what interest, if any, has been paid, and the amount of interest due on each, are set forth in detail); that petitioner is also the legal holder and owner of a certain warrant, No. 21, of installment No. 6, issued by said Village and dated September 24, 1894, for \$213.19 to Kissack & Muir or order, and that on said warrant there is due petitioner said sum, together with interest at 6 per cent per annum thereon from July 1, 1899; and that said Village (now City) has failed and neglected to collect certain assessments, amounting to \$3,786.98, exclusive of interest, levied and assessed against private property in said special assessment proceeding, and that said sum is still due and unpaid to said City, and that by reason thereof petitioner has not received the amounts due him upon said bonds and warrant.

On January 6, 1910, all of the defendants named in the petition filed a general demurrer thereto. Subsequently the court, after argument of counsel, overruled the demurrer, and on February 28, 1910, said defendants filed an answer.

In the first paragraph of the answer the defendants admit that the ordinance for the improvement was passed by the Village on February 20, 1894. The ordinance is set out in full, and it appears that the allegations of the petition relative thereto are substantially correct.



In the 3rd paragraph the defendants admit that on February 27, 1934, there was filed by the village attorney in the county court the petition for the levy of special assessment No. 23, and that thereafter an assessment roll was there filed, but defendants say that the board of trustees did not authorize the filing of said petition by the Village attorney, but directed it to be filed by the president of the board, and that no such petition was ever filed by said president.

In the 3d paragraph the defendants admit that an ordinance was passed providing for the issuance of bonds, substantially as set forth in the petition.

In the 4th paragraph the defendants admit that the different amounts of assessments and public benefits were assessed against the Village, as alleged in the petition, and that no appropriations for the payment thereof have ever been made by said Village or City, but they deny that said assessments are due and unpaid.

In the 5th paragraph the defendants deny that petitioner is the legal holder and owner of the bonds and warrant mentioned in the petition.

In the 6th paragraph the defendants admit that they have not collected the amounts of assessments against private property as set forth in the petition, and allege that there is no duty imposed by law upon them or either of them to collect the same, and that if any such duty is imposed by law upon any official of said City it is not imposed upon any of the defendants.

In the 7th paragraph the defendants say that the writ should not issue because it appears from the petition that petitioner has been guilty of laches in not prosecuting his petition within a reasonable time after his right of action, if any be had, accrued, and petitioner fails to show any excuse for the delay.



In the 8th paragraph the defendants plead the ten years statute of limitations as a defense to the petition.

In the 9th paragraph the defendants allege, as a reason why the writ should not issue, that the ordinance does not specify the nature, character, locality and description of the proposed improvement as required by law; that, for that and other reasons, the ordinance is void, and by reason thereof the county court acquired no jurisdiction in the confirmation proceedings; and that the judgment of said court confirming said assessments against private property and against said Village for public benefits is void and unenforceable.

In the 10th paragraph the defendants in substance allege, as a further reason why the writ should not issue, that petitioner on July 12, 1899, filed objections in said county court, upon application of the county collector for judgment and order of sale for the delinquent 5th installment of the assessment levied against certain property of said petitioner; that said objector (petitioner) set up five objections attacking the validity of the application of said county collector for judgment and order of sale (said objections being set forth in full), and four other objections attacking the validity of the original confirmation proceedings and the judgment entered therein (said objections also being set forth in full); that of said last mentioned objections the 7th objection was that "in the proceedings for the confirmation of said special assessment the ordinance authorizing said improvement did not specify the nature, character, locality and description of the proposed improvement, and was for other reasons void, and the court acquired no jurisdiction in said proceedings"; that upon said cause coming on to be heard on said objections, the county court, on December 30, 1902, entered an order, upon motion of said county collector, amending, ming pro tung as of July 20, 1899, an order theretofore entered



by said court on said date; that by said amendatory order the court sustained said objections to the collection of said fifth installment of said assessment against the property of said objector (petitioner), which said order was never thereafter reversed or modified and is still in full force and effect; that, therefore, by reason of the foregoing and because said objector (petitioner) caused said county court to enter such order and to sustain his said objections, particularly said 7th objection, the defendants say that petitioner "is precluded and estopped from filing the petition in this cause, and claiming and contending, as he now does in the petition herein filed, that such ordinance is valid, and that the assessments and public benefits levied in the county court of Cook county, * * the levying of which was based upon said ordinance, are collectable or enforceable"; and that defendants further say that "ever since the entry of said order of the county court refusing judgment, the City of Park Ridge, its officials and all owners of private property assessed, by reason thereof, have continuously regarded and treated said order of confirmation as absolutely null and void, and therefore not properly or legally enforceable."

In the 11th paragraph the defendants allege, as a further reason why the writ should not issue, that no demand for the performance of the matters and alleged duties sought to be enforced was made upon the defendants, or either of them, prior to the commencement of this suit.

In the 12th paragraph the defendants allege that in the present fiscal year of the City of Park Ridge, and for several years past, the financial condition of said city has been such that its city council has levied and been compelled to levy the full limit of tax prescribed by law to 60 cents on each \$100 of

the assessed valuation of its taxable property, in order to provide for the annual appropriations required to be made by law to defray all actual and necessary expenses and liabilities of the City, and that the amount of such maximum levy at no time during the last number of years has been sufficient, nor will it be sufficient in the next succeeding year and years, to fully provide for the payment of all actual expenses and liabilities of said City; and that by reason thereof the issuance of the writ as prayed for would create an undue hardship upon said city and its taxpayers by adding to its annual appropriation the amount of the assessments and public benefits referred to in the petition, the payment of which would necessarily have to come out of said maximum levy.

On March 15, 1919, the petitioner filed a replication to the 4th and 5th paragraphs of said answer and a general demurrer to the 3rd, 6th, 7th, 8th, 9th, 10th, 11th and 12th paragraphs. After argument, the court sustained said demurrer to all of said last mentioned paragraphs, and the defendants were given time in which to amend. On March 27, 1919, the defendants filed an amendment to their original answer, in which they amended only paragraphs 10th and 12th thereof. On April 5, 1919, on motion of the attorneys for the petitioner, the court ordered that petitioner's demurrer to the original answer stand as a demurrer to said amendment, and, after argument, the court further ordered that said demurrer be sustained and defendants were given further time in which to amend. On April 15, 1919, defendants filed a second amendment to their original answer in which they amended only paragraph 12th thereof. On May 28, 1919, the court sustained petitioners general demurrer thereto, and, defendants electing to stand by their answers and declining to further amend the same, the court ordered that judgment be entered for petitioner upon his demurrers. On the same day

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there was a hearing before a jury upon the issues of fact made by the 4th and 5th paragraphs of defendants' original answer and petitioner's replication thereto. Proof was made by petitioner that he was the owner of the bonds and warrant, as set forth in the petition, and that the same were unpaid. No evidence was offered by defendants. On motion of petitioner the court instructed the jury to return a verdict finding the issues for him, and that the special assessments and public benefits set forth in his petition are still due and unpaid, and that he is the legal holder and owner of the bonds and warrant therein set forth, upon which there are now due and unpaid certain sums of money, according to the tenor and effect thereof. To the giving of the instruction defendants objected, and thereupon the jury returned the verdict as directed, and the judgment appealed from followed.

The amended 12th paragraph of defendant's answer is substantially the same as originally filed. The additions are that, prior to the entry by the county court of the quang pro quang order of December 30, 1902, said court on July 20, 1899, ordered that all of the objections of the objector (petitioner) be sustained and that application for judgment is refused; and that, ever since the entry of said orders, "the City of Park Ridge, the members of its city council, and all of its officials whose duty in any way relates to the collection or enforcement of special assessments, continuously regarded it as their legal duty to refrain from the enforcement of said assessments, or any part thereof, and that neither the plaintiff nor any other person, until the commencement of this suit, have requested the City of Park Ridge, the members of its city council, or any of its officials, to enforce the collection of said assessments". In the amended 12th paragraph of the answer is set forth the probable income and expenditures of the City for the fiscal year 1912, etc.

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MR. JUSTICE GRADY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for defendants that the petition, admitting all the averments therein to be true, does not disclose facts sufficient to warrant the issuance of the writ. This question was raised when defendants demurred generally to the petition. On the overruling of the demurrer they elected to and did file an answer. A petition for mandamus, under our practice, takes the place of a declaration in ordinary actions at law. (People v. Payson, 151 Ill. 101, 105); and the action is governed by the same rules of pleading as are applicable to other actions at law. (People v. Board of Education, 226 Ill. 154, 156.) "The rule is well settled in this State that where a party to an action desires to have an order of the court overruling a demurrer reviewed in a higher court he must abide by the demurrer; by pleading over, the demurrer is waived." (Habibson v. Illinois Brick Co., 245 Ill. 440, 442.) "On demurrer a declaration is construed against the pleader, but after verdict all intendment and presumptions are in its favor." (Sargent Co. v. Babbie, 215 Ill. 429, 430.) Where no cause of action is stated by the declaration the omission is not cured by verdict, but "a verdict will aid a defective statement of a cause of action by supplying facts defectively or imperfectly stated or omitted which are within the general terms of the declaration." (Sargent Co. v. Babbie, supra, p. 431; Chicago & Alton R. Co. v. Hanson, 173 Ill. 100, 104). We think that the allegations of the petition in the present case are sufficient, at least after verdict, to sustain the judgment awarding the issuance of the writ. The rights and liabilities of the parties are to be determined by provisions in Article 9 of the Cities and Villages Act of 1872. (Sec. 99 Local Improvement Act of 1897; People v. City of Pontiac, 105 Ill. 437; City of Alton v. Heidrick, 246 Ill. 76, 78.) By Section 34 of

said Article 9, the judgment of confirmation, entered May 3, 1894, is a lien upon the property assessed from that date until payment; and by section 51 all special assessments are liens upon the property assessed from the date of the assessment until paid; and by section 2 of the Act of June 17, 1893, authorizing the division of special assessments into installments and authorizing the issue of bonds to anticipate the collection of the deferred installments, bonds may be issued against the second and succeeding installments, to anticipate the collection thereof, with interest thereon at the rate of 6 per cent per annum, but shall not be dated or issued until at least 90 days after the installment against which they are issued begin to draw interest. And it is seemingly the policy of the law of this State, both under the provisions of said Article 9 and the present Local Improvement Act, that a contractor or bondholder, who is required to look to the collection of the special assessment for the payment of his claim, may have mandamus or injunction to compel the levy and collection of a special assessment or assessments necessary for that purpose, upon the neglect or refusal of the City or Village. (*Higgins v. City of Chicago*, 18 Ill. 274; *Conroy v. City of Chicago*, 237 Ill. 126; Secs. 73 and 90 Local Improvement Act, 1897.) And we do not think that the city can here be heard to say that its predecessor, the Village, did not adopt said Article 9, when it appears that it passed an ordinance thereunder and levied and had confirmed an assessment for the improvement authorized thereby. Neither do we think that there is any merit in the contention that the record does not affirmatively show that the Village attorney was duly authorized to institute the special assessment proceedings in question. It is to be presumed that he was duly authorized so to do.

It is next contended by counsel that the petition on its face does not disclose facts indicating that petitioner has not been guilty of laches in waiting, as the petition shows he has waited,



over 15 years before commencing his action. The answer to this contention is that after the demurrer of the defendants to the petition was overruled, they filed an answer thereby waiving the deficiency, if any there was. Furthermore, while it is true that it has been held in some cases that an unreasonable delay in commencing the action may sometimes be ground for refusing relief by mandamus, if the delay has been prejudicial to respondents rights, or if confusion and disorder will result from the issuance of the writ, or if the rights of third persons have intervened, the present record does not disclose any such facts.

It is also contended by counsel that the "five-year" general statute of limitations set up by defendants in their answer had run before the suit was commenced and therefore bars its prosecution. The "five year" statute was not mentioned in the answer, although the ten years statute of limitations was set up as a defense. We do not understand that the general statute of limitations applies to a special assessment proceeding. Furthermore, the petitioner is not suing on the bonds, but seeks only to compel the City to proceed with the collection of an assessment already levied and confirmed against private property, and to appropriate and levy a sufficient sum to pay the 6th and 7th installments of its public benefits. Furthermore, as we understand the law, the duty to levy and relevy and collect is a continuing one and is not discharged until ample funds are created and collected to retire the bonds. There is a limitation found in section 48 of said Article 9 of the Cities and Villages Act, imposing a five years limitation upon the levy of a new assessment against delinquents, but the present record does not disclose that a new assessment against delinquents is sought; or is necessary, because, if the City will continue the collection of the original assessment against private property and pay its own unpaid installments of public benefits, there apparently will be sufficient funds created to retire the bonds and amount held by petitioner.

It is further contended by counsel that the petition does not show that prior to the filing thereof any demand was made upon any of the defendants to perform any of the acts sought to be enforced, and that there was a refusal or failure to comply with each demand. The general rule is that a demand should be made before applying for mandamus, but this rule does not apply where the duty, the performance of which is sought to be enforced, is of a public nature. (People v. Board of Education, 127 Ill. 613, 625; People v. Kinsley, 171 Ill. 44, 51; People v. Allen, 61 Ill. 52, 53.) Furthermore, the record sufficiently shows that a demand would have been futile. (People v. Getzenmacher, 137 Ill. 234, 262.)

It is further contended by counsel in substance that the city collector is a necessary party defendant. We do not think so. (People v. Getzenmacher, supra; People v. Raymond, 120 Ill. 427, 433.) The city, its mayor, clerk and aldermen were made parties. The duty, the performance of which is sought to be enforced, is a corporate duty. Furthermore, the persons whose duty it is to sue out the warrant and designate the collector have been made parties defendant. If no collector has been designated it is the duty of the mayor and aldermen to designate one.

It is further contended by counsel that there is nothing contained in the petition, or in the record, to indicate what the total assessment levied, or the total cost of the improvement, or the total assessments collected, were. The answer of defendants shows that the 5th and 7th installments of the assessments against private property and for public benefits have not been paid, because it is therein stated in substance that ever since the year 1869, when the collection of the 5th installment of Murphy's assessment was defeated, the City has refrained from appropriating any sum for the payment of the unpaid portion of its public benefits and from collecting the 5th and 7th installments against private property. We think it is immaterial what the total assessment

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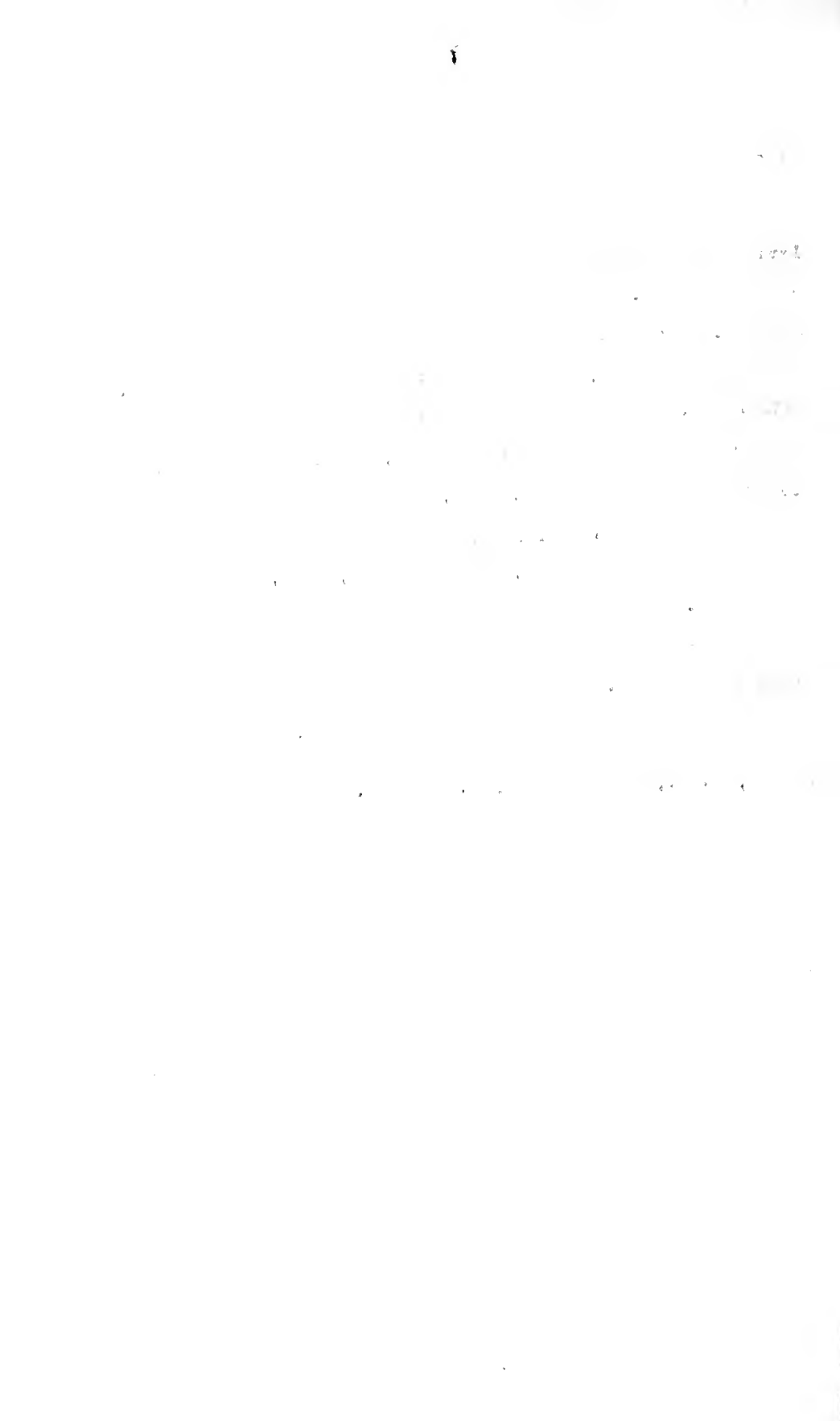
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levied was, or what the total cost or the total assessments collected were. And we think it is the duty of the City to resume the collection of the unpaid installments and thereby pay its just debts, as evidenced by the unpaid bonds held by petitioner. Counsel for defendants has not argued that the order of the county court of July 20, 1899, or the quia pro hunc order of December 30, 1902, mentioned in paragraph 10th of defendant's answer, is res adjudicata against the validity of the ordinance or the judgment, entered May 5, 1894, confirming the assessment.

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.



256 - 25514

RICHARD STARK, doing business
as RICHARD STARK & SON,
Appellee,

vs.

PATRICK CARROLL,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2191A. 651

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$101 rendered March 7, 1919, in the Municipal Court of Chicago against the defendant, Patrick Carroll, in favor of the plaintiff, Richard Stark. The action was brought to recover a balance which plaintiff claimed to be due him under the provisions of a certain building contract executed by the parties on May 20, 1916.

On the trial, which was before the court without a jury, it appeared that the balance which plaintiff claimed was due him amounted to \$125, and that the defendant claimed that nothing was due plaintiff because of the latter's failure to comply with certain provisions of the contract and to complete the work within a certain time. It was provided in the contract that the work should be fully completed "on or before thirty calendar days after plastering is dry." There was evidence tending to show that the plastering became dry about September 17, 1916, that the work was fully completed about October 23, 1916, and that, hence, there was a six days delay in the completion of the work. It was further provided in the contract that "should the contractor fail to finish the work at the time agreed upon, he shall pay or allow the owner, by way of liquidated damages, the sum of \$4 per diem, for each and every day thereafter that the said work shall remain incomplete." The court, in assessing plaintiff's damages at \$101,

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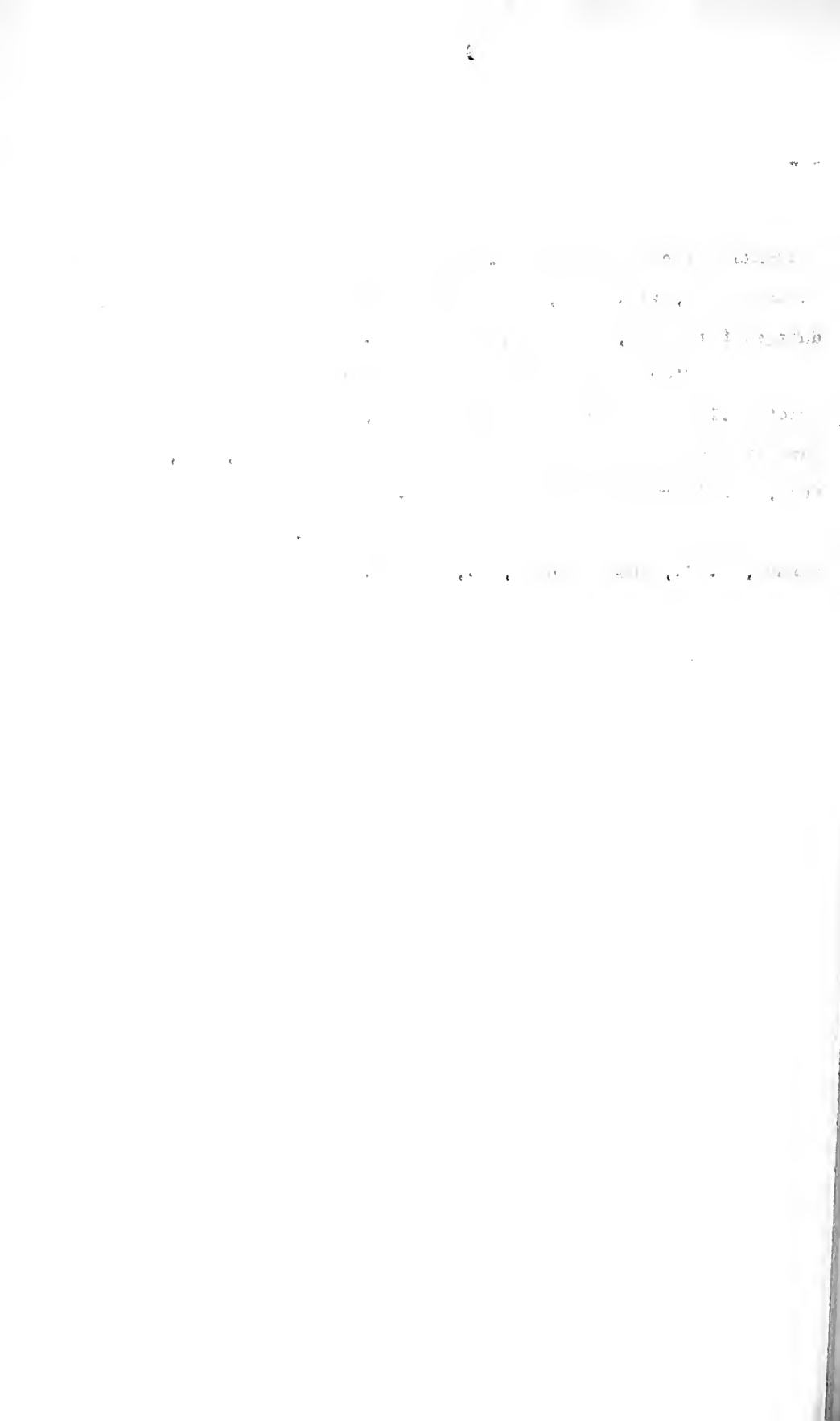
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evidently allowed plaintiff the full amount of the balance claimed to be due, viz. \$125, and deducted therefrom the sum of \$24, damages for delay, 6 days at \$4 per day.

After a review of the abstract of the record and the briefs filed we are of the opinion that, by the finding and judgment entered, substantial justice has been done, and, therefore, the judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.



299 - 25557

UNITED STATES COAL COMPANY,
a corporation,
Appellee,

vs.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

219 I.A. 652

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced December 22, 1906, to recover of the defendant, Board of Education of the City of Chicago, for the purchase price of certain coal sold and delivered under a written contract, the court on the hearing on May 29, 1919, instructed the jury to return a verdict finding the issues for the plaintiff and assessing plaintiff's damages at the sum of \$11,416.73, which they did. Judgment against the defendant for this amount was entered and this appeal followed.

The pleadings are voluminous. Plaintiff's original declaration consisted of two special counts and the consolidated common counts. On June 2, 1913, plaintiff by leave of court filed six additional counts. To all counts defendant filed a plea of the general issue with notice of set off and four special pleas, two of which were pleas of set off, to which special pleas plaintiff filed replications.

In September, 1902, the City of Chicago was divided into five fuel districts for the purpose of supplying the school buildings therein with coal. Districts 3 and 4 are herein involved. District 3 was west of the Chicago river and south of Madison street, and District 4 was on the south side of

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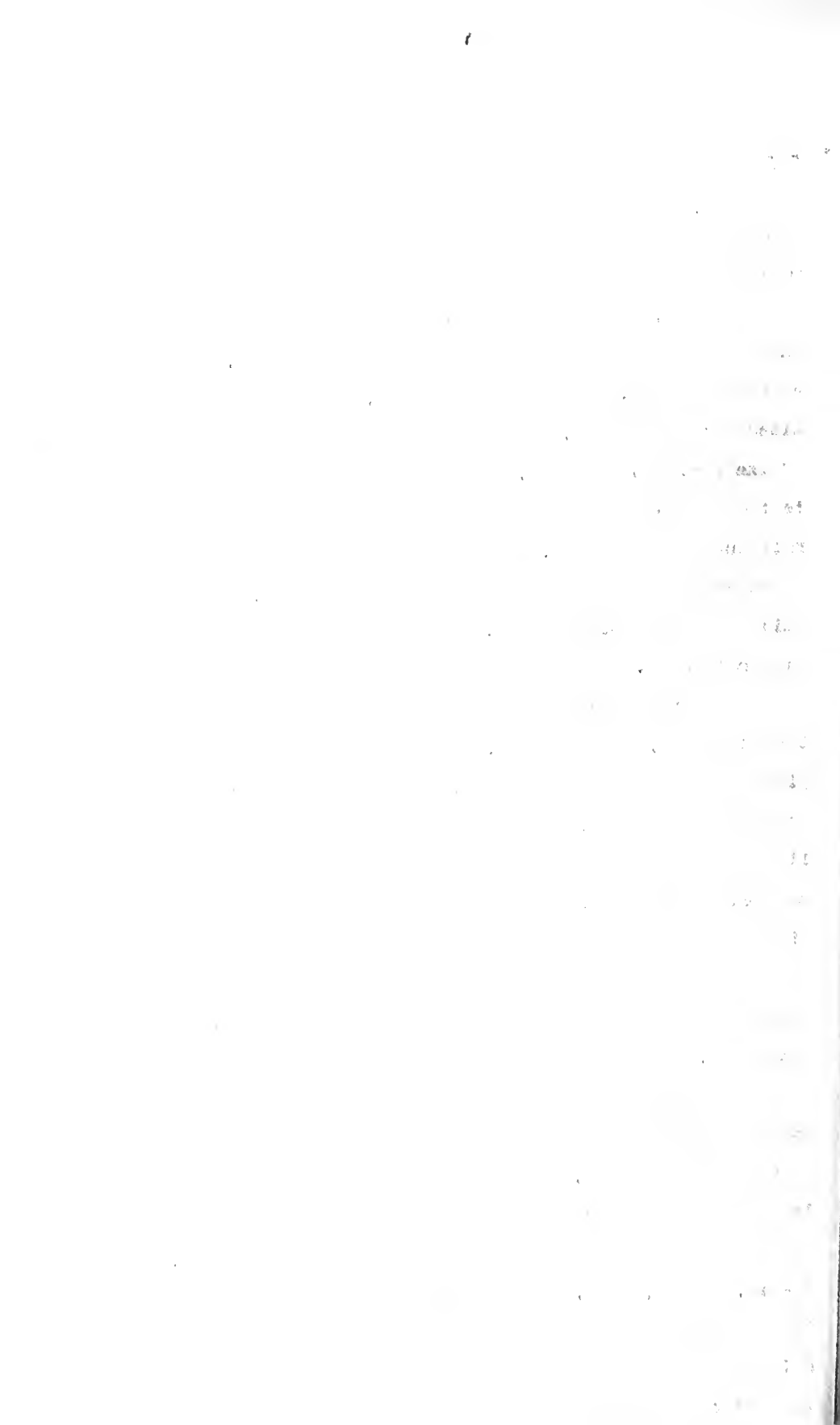
the city, east of the Chicago river.

On September 5, 1902, plaintiff, an Illinois corporation, entered into two separate contracts with said Board of Education, defendant, to deliver coal to all school buildings, located respectively in said districts 3 and 4, for and during the school year ending June 30, 1903. The kind of coal to be delivered was designated in said contracts as "Indiana Block Coal", and the stipulated price per ton was \$2.87 for that delivered in district 3, and \$2.92 for that delivered in district 4. The coal company (plaintiff) covenanted and agreed inter alia to "promptly deliver the said coal, which shall be the best of its kind, to any and all of the various school buildings" in said districts, "in such quantities and at such times as may be directed by the business manager of the said Board of Education, and should it, from any cause or at any time, fail to promptly deliver coal ordered to be delivered to any of the public school buildings aforesaid, the business manager shall have the right, either personally or through others whom he may designate, to purchase from any coal dealer in the vicinity or elsewhere, and to have delivered, not exceeding ten tons of coal at a time, to supply the want of any school building", which the coal company "has failed to supply in accordance with the order of said business manager within three days after the receipt of such order; said coal so purchased by said business manager to be of any grade or quality which can be obtained from coal dealers in the vicinity of such school building, and to purchase the same at the expense of" the coal company, "and to deduct the difference in cost, if any, between the price thus paid and the contract price hereinbefore specified, from any moneys due or accruing to" the coal company from the Board of Education under the terms of said contracts; and "said coal is to be furnished * * and delivered under the supervision and direction of the business

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manager * * and to the approval and satisfaction of said business manager and of the Committee on Buildings and Grounds of said Board of Education, and * * at the time mentioned in the specifications". The Board of Education covenanted and agreed that, in consideration of said covenants of the coal company, it would pay the price mentioned for said coal, "payment to be made only upon the certificate of the business manager", and "all such certificates to be subject to the approval of the Board of Education and of the Committee on Buildings and Grounds", and "all payments to be made by warrants drawn upon the Treasurer of the City of Chicago, drawn and to be paid as soon as practicable, according to the ordinary routine of such business".

In some of the special counts plaintiff set out these two contracts, respectively, in habeas verba, and in other counts pleaded the same, respectively, according to their legal effect, and averred in substance that from time to time it promptly delivered all of said Indiana Block Coal, required for use in the particular district, and in such quantities and at such times as directed by said business manager, that said coal was accepted by defendant and used by it, and that at all times plaintiff faithfully kept and performed all of its covenants in said contracts mentioned, yet the defendant would not pay for certain coal so delivered to the damage of defendant, etc. And in other of said special counts the plaintiff also averred in substance that the defendant wrongfully, and in violation of said contracts, refused to permit its business manager to make his certificate that plaintiff was entitled to be paid for certain coal delivered; that on to-wit, July 1, 1903, said business manager did make a certificate that plaintiff had delivered to defendant certain coal, but that said business manager, at defendant's request, made an addition to said certificate that certain amounts should be deducted from the price of said coal, which said deductions were improper and



not lawfully chargeable against plaintiff, etc.

In one of defendant's special pleas of set off it is alleged in substance that plaintiff was, before and at the time of the commencement of the suit, and still is, indebted to the defendant in the sum of \$11,459.86 for "the difference in price of coal purchased from local dealers in Districts numbered 3 and 4, under the terms, provisions and covenants of certain contracts, * * more specifically set forth in plaintiff's declaration and additional counts, * * said difference in price of said coal being the price paid for the same quality, efficiency, grade and character of coal to be furnished under * * said contracts * * to local dealers in coal in the respective localities nearest the school buildings needing said coal, less the contract prices set forth in said contracts * * for the respective grades, quality, character and efficiency of coal so to be delivered and furnished by the said plaintiff to the defendant, * * which said sum of money, so due from plaintiff to defendant, exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the several supposed promises in the said declaration mentioned, and out of which said sum of money the defendant is ready and willing and hereby offers to set off and allow the plaintiff the full amount of said damages", etc. The other special plea of set off, while more in detail, is to the same effect. In defendant's notice of set off there was incorporated a tabulated list purporting to show in detail the several amounts deducted from plaintiff's said contract "for coal purchased to keep up the supply at the various schools." In this list appeared names of coal dealers, the various dates of alleged purchases of coal, the various amounts paid, the contract price of the coal, the deductions made, the total sum of all deductions, aggregating \$11,459.86, and the names of the school

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buildings to which coal was alleged to have been delivered.

On the trial it was agreed that the contracts set up in plaintiff's declaration were the contracts of the parties. Plaintiff called as witnesses John Guilford, business manager of defendant during the years 1902 and 1903; S. M. Frankland, an employee of defendant during said years; and Harry H. Brackett, auditor of defendant since September, 1914. And plaintiff introduced various exhibits taken from the records of defendants. Plaintiff's evidence showed that during the months of January, February, April and July, 1903, plaintiff had delivered certain coal to defendant and had rendered bills therefor to defendant; that the coal had been received and used by defendant but had not been fully paid for; and that the amount unpaid for the coal aggregated the sum of \$11,416.73. Plaintiff's exhibit 9, supplemented by the testimony of the witnesses Brackett and Guilford, showed that plaintiff had rendered defendant a bill for \$15,062.76 for coal delivered during the months of January and February, 1903; and that a memorandum had been written at the foot of the bill, making a deduction of \$9,731.55 for "difference in price of coal purchased to keep up supply", and leaving a balance admittedly due plaintiff of \$5331.21. Plaintiff's exhibit 9-A, supplemented by the testimony of said witnesses, showed that a warrant for \$5331.21, dated April 15, 1903, and drawn by defendant on the Treasurer of the City of Chicago, was paid on December 4, 1903 to plaintiff; that said warrant bore on its face, the words and figures, "Less difference in price of coal purchased to keep up supply, \$9,731.55"; and that attached to said warrant was the following statement:

"Board of Education of the City of Chicago claims the right to credit itself with the difference in price of coal purchased to keep up supply, as above. United States Coal Co. disputes the said credit of \$9,731.55. The balance of \$5,331.21 is this day paid by the Board of Education of the City of Chicago to the United States Coal Co., and received by the United States Coal Co.

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without prejudice to the rights or claims of either the Board of Education of the City of Chicago or the United States Coal Co."

Plaintiff's exhibits 10 and 10-A, supplemented by the testimony of said witnesses, disclosed that plaintiff had rendered defendant a bill for \$5393.92, for coal delivered during the month of April, 1903; that a deduction of \$1490.52 for the same alleged reason had been made; that on May 27, 1903, defendant had drawn a warrant for \$3,903.40, which was paid plaintiff on December 4, 1903; the said warrant bore on its face the endorsement, "Reduction a/c fuel purchased from local dealers, \$1490.52"; and that attached to the warrant was a similar statement as above set forth. Plaintiff's exhibits 12 and 12-A, supplemented as aforesaid, disclosed that plaintiff had rendered defendant a bill for \$538.21 for coal delivered during the month of July, 1903; that a deduction of \$194.66 for the same alleged reason had been made; that on September 16, 1903, defendant had drawn a warrant for \$343.55, which was paid plaintiff on December 4, 1903; and that attached to the warrant was a similar statement as was attached to Exhibit 9-A. The aggregate sum of said three deductions is \$11,416.73.

The defendant on the trial relied upon its claim of set off to defeat plaintiff's claim. It called as witnesses Clayton Mark, president of the Board of Education in 1902, and C. M. Frankland, previously called as a witness by plaintiff. Mr. Mark testified to having various conversations and telephone talks in 1903 with Mr. O'Gara and Mr. Lawler, representatives of plaintiff, regarding deliveries of coal, and to having various conversations with Mr. Guilford and Mr. Frankland regarding said deliveries. Mr. Frankland testified in substance that in the years 1902-3 he was employed in the office of the business manager of defendant, Mr. Guilford, in the capacity as assistant manager; that sometime in January or February, 1903, he had a conversation with Mr. O'Gara

1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a list of appendices.

6. The sixth part of the report is a list of figures and tables.

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in his (Frankland's) office; that he informed O'Gara that certain schools were not getting sufficient coal; that O'Gara replied that his company was "doing everything possible to make deliveries"; and he also had certain other conversations over the telephone with Mr. Lawler urging deliveries.

After a careful consideration of the record before us we are of the opinion that the trial court was fully justified, at the close of all the evidence, in instructing the jury to return a verdict in favor of the plaintiff and assessing plaintiff's damages at the sum of \$11,416.73, and in entering the judgment appealed from. The evidence clearly showed that plaintiff, under said contracts, had delivered coal of the value of \$11,416.73 to the defendant, which defendant had not paid for, and that defendant had received and used said coal. The defendant claimed, in its pleas and notice of set off, in substance that because of plaintiff's failure to make deliveries of coal under said contracts many schools were in immediate need of coal; that, "to keep up the supply", it purchased large quantities of coal of other dealers at prices greater than the contract prices; that it had a right, under such circumstances, and under the terms of said contracts, to deduct the difference from any monies due or coming due to plaintiff; and it did make deductions aggregating said sum. But defendant failed to make some essential proof. It did not prove that at the time or times in question the plaintiff failed, as stated in the contracts, "to promptly deliver coal ordered to be delivered to any of the public school buildings", or that at any time it was necessary to "supply the want of any school building" by purchases elsewhere, or that plaintiff at any time failed to supply coal "in accordance with the order of said business manager within three days after the receipt of such order." Nor did defendant prove the amounts of coal pur-

chased elsewhere, nor of whom purchased, nor for what purpose. The burden of proving its claim of set off rested upon the defendant. (Pettis v. Westlake, 3 Scam. 535; East v. Crow, 70 Ill. 91; Ellis v. Cethram, 117 Ill. 458.)

After the reply brief and argument of counsel for the Board of Education was filed in this court, counsel for the coal company filed a written motion that said pamphlet be stricken from the files, which motion was reserved to the hearing. That motion is now denied.

For the reasons indicated the judgment of the Circuit Court will be affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

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ARTHUR BUELENS,
Appellee,

vs.

CHARLES LINDBERG,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

219 I.A. 652

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 1, 1918, the plaintiff, Arthur Buelens, brought suit against the defendant, Charles Lindberg, before a justice of the peace in Cook County, which resulted in a judgment against the defendant for \$200. From this judgment defendant perfected an appeal in the Superior Court of Cook County, and plaintiff there subsequently entered his appearance, and on January 27, 1919, a trial was had de novo, before a jury, resulting in a verdict finding the issues for plaintiff and assessing plaintiff's damages at the sum of \$180, upon which verdict the court, on February 8, 1919, entered judgment against defendant for that amount, and defendant appealed.

It appears from the bill of exceptions (containing the documentary evidence introduced on the trial and the substance of the testimony of the plaintiff, the defendant, and one witness for defendant, as well as the given and refused instructions) that defendant was the general contractor for the erection of 30 frame bungalows in Gary, Indiana; that on November 6, 1916, plaintiff and defendant entered into a written contract wherein plaintiff agreed to do the plastering work on said bungalows for the sum of \$111 for each building, - \$55 to be paid him by defendant when "first coat of browning is on" and the balance when hard finish is complete, and the "payment of this amount to be made on every

five buildings"; that after plaintiff had finished doing the brown coat on the five buildings in question he asked defendant for his pay at \$55 per building, but defendant said he could not make such payment because the owner had not paid him and could not get a loan and that he (plaintiff) "had better stop work"; that plaintiff thereupon stopped work; that, according to plaintiff's testimony, the work he had already done was reasonably worth \$40 per building, or \$200; that subsequently, at plaintiff's request defendant moved some of plaintiff's material and paid a freight charge of \$5, and subsequently paid plaintiff the sum of \$15.

Defendant claimed that after allowing all just credits plaintiff was only entitled to recover the sum of \$45. The jury by the verdict, however, seemingly allowed plaintiff for the work done \$200, deducting therefrom said freight charge and payment aggregating \$20, and we think they were justified under all the evidence in so doing.

It is urged that the court erred in modifying instruction No. 1, presented by defendant, and giving it as modified, but in our opinion the instruction as modified was proper. And in view of the language of said modified instruction we do not think the court erred in refusing to give defendant's fourth instruction.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Batchett, J., concur.



325 - 25584

ROTHSCHILD & COMPANY,
a corporation,

Appellee,)

v.

BOSTON STORE OF CHICAGO,
a corporation,

MAYO FRIEDBERG,

Appellant.)

APPEAL FROM

CIRCUIT COURT
OF COOK COUNTY.

219 I.A. 652

MR. JUSTICE GRIDLEY delivered the opinion of the court.

For the reasons indicated in the opinion of this appellate court, this day filed, in the case of Rothschild & Company, appellee, versus Boston Store of Chicago, appellant, General Number, 25583, the order of the circuit court of Cook County, entered May 12, 1919, adjudging Mayo Friedberg, appellant herein, guilty of contempt of court in violating a preliminary injunction, and imposing upon him a fine of \$25 and committing him to the county jail for a period of two days, is reversed.

REVERSED.

Barnes, P.J., and Matchett, J., concur.

25038
162 - 25038

IDA E. MACK BARBER,

Appellee.

vs.

SAMUEL A. TOLMAN et al.,

On appeal of SAMUEL A. TOLMAN,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

219 I.A. 652

MR. JUSTICE ROBERTS DELIVERED AN OPINION OF THE COURT.

The original bill in this case was filed by Ida E. Mack Barber, complainant, December 4, 1901. It was verified by Charles F. Packer, as her agent, and made defendant thereto, Samuel A. Tolman.

The bill alleged that on August 29, 1901, Melville C. Roberts, August Jernberg, Charles C. Cook and George C. Rodder, executed and delivered to Charles F. Packer, their promissory note for \$25,500, due six months after date, to the order of Packer, with interest at the rate of 7% per annum. That said note was endorsed and guaranteed by Packer and delivered for a loan of \$25,000, which the said defendant, Tolman, agreed to make at a usurious rate of interest; that a deduction was made therefrom, so that the total amount loaned was \$23,985.35; that there was deposited with said Tolman, as collateral security for said note a large amount of personal property, including a note for \$10,000, dated June 21, 1900, due five years from date, signed by Packer, payable to his own order and by him endorsed, together with a trust deed executed by himself and wife, which trust deed was a lien on lot twelve, in block two, in Hyde Park, Cook County, Illinois. That defendant Tolman had collected large sums on said collateral and had been paid large sums on the note as

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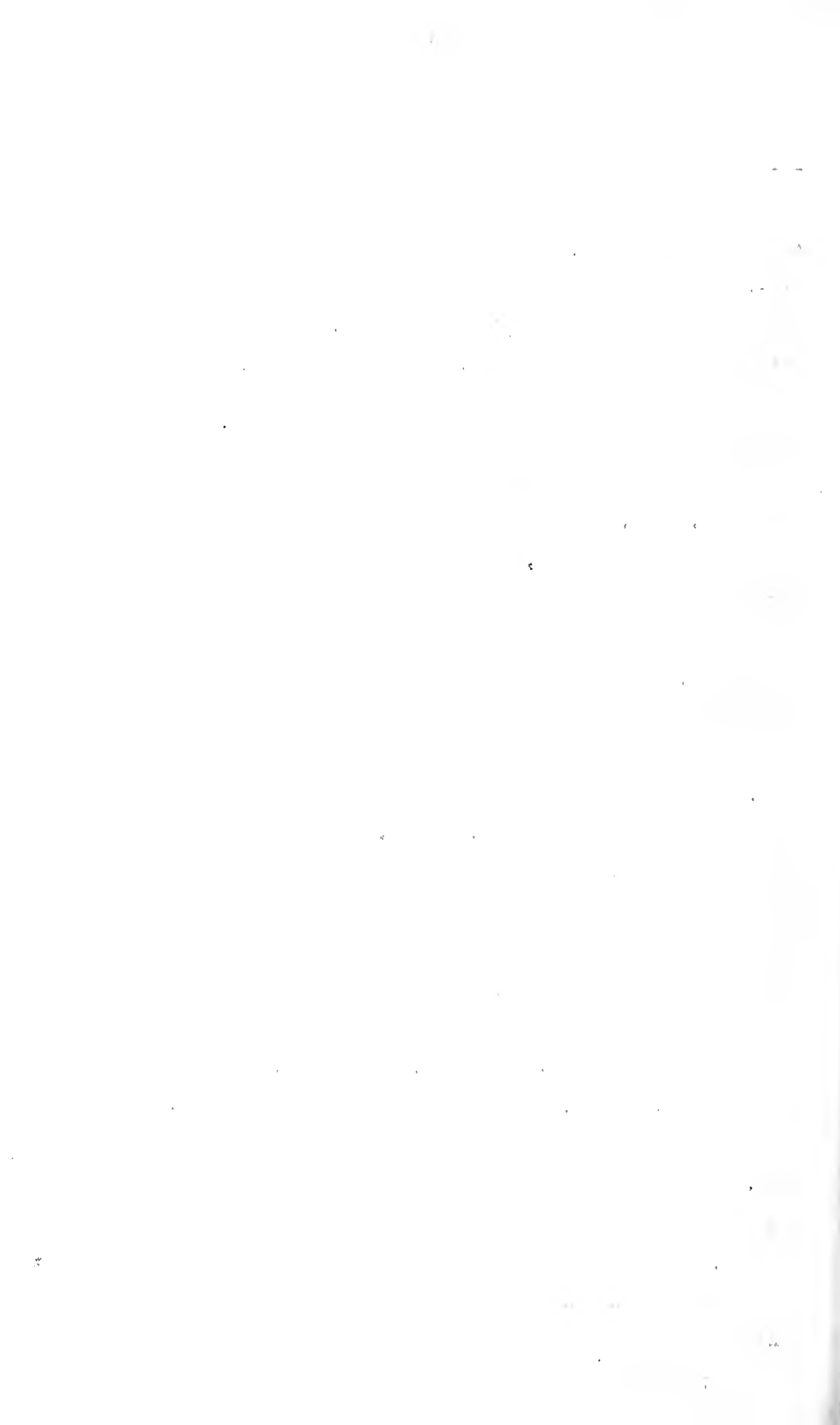
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complainant was informed and believed the note had been largely overpaid; that Tolman, with full knowledge of complainant's rights, had wasted and failed to enforce the collection of a large portion of the collateral which in equity should be applied to the payment of the note, as between Tolman and complainant. That on or about September 9, 1896, Tolman made an agreement with the plaintiff for a valuable consideration that as soon as the said note should be paid, said Tolman would turn over to complainant all collateral remaining in his hands, which had theretofore been deposited with said Tolman as security for said note, which said collateral then in his hands had been bought by him under collateral powers of sale; that as a part consideration for such agreement, she, complainant, conveyed and turned over to him other real estate described and other collateral; that the original note had been more than paid with legal interest, and that payments on the note, which should in equity be applied thereto, were in excess of \$71,000; that the original transaction was usurious and that the mortgage executed by Parker and his wife had been foreclosed by Tolman and the property bought in by him in such proceedings, and that he was about to take out a deed upon the same and would, unless restrained, take possession thereof; that complainant had at various times demanded an accounting and that Tolman had only rendered a pretended and untrue account, etc. The bill prayed a full discovery and accounting of the indebtedness for which the said \$28,500.00 note was given, of the securities pledged therefor, of all money or property paid or delivered to said Tolman therefor or paid to him on account thereof, of all securities or collateral lost, squandered or diverted, and of all his acts and doings, and that he might be decreed to deliver to complainant all the securities and property then in his hands which were pledged as security for the payment of the note, and by him sold and bought in, and that proper deeds

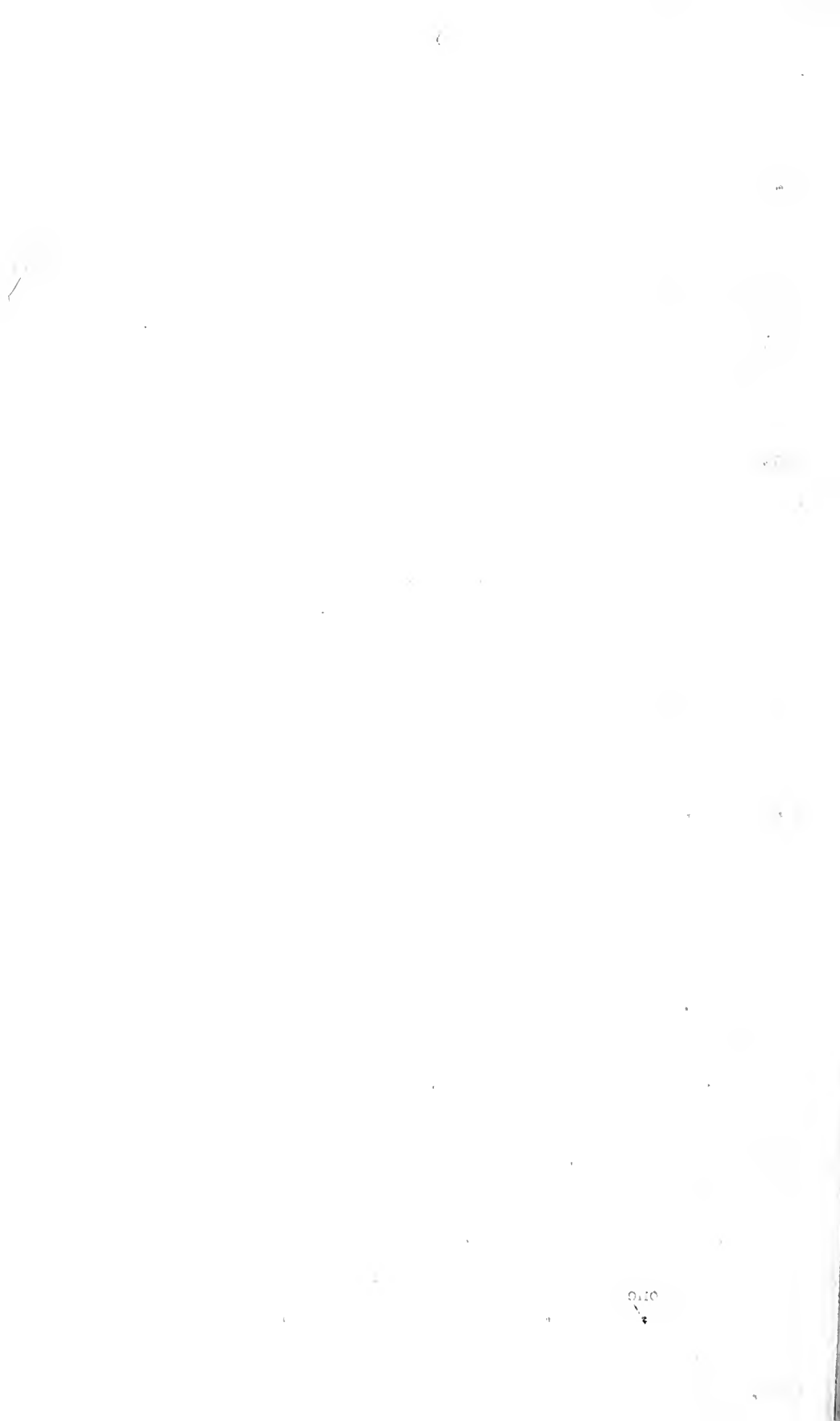
of conveyance might be made to her of the real estate, pledged, etc., and that he should be restrained and enjoined from taking out a deed upon the master's certificate, and that she might have other and further relief, etc.

By an amendment to the bill filed February 7, 1902, complainant alleged that she had been owner of the said real estate described as lot twelve, etc., since the third day of September, 1895; that your orator is unable to state until an accounting has been had, what sums have been collected or what payments have been made to said Tolman; the precise description of which collateral your oratrix is unable to state without an accounting; that the collateral improperly delivered up by said Tolman will appear fully upon an accounting. He also alleged in detail the making of the alleged agreement of September 9, 1895, stating that the defendant Tolman acted by Edwin M. Ashcroft, while she acted by Charles F. Packer. The act up also by said amendment a detailed description of the collateral conveyed and turned over by her to Tolman as allegedly further stated that she had requested Tolman "to carry out the agreement with your oratrix", which he had refused to do, and that he had refused to account with respect to the transaction, and refused to turn over to complainant the pledged collateral. The bill, as amended, was also verified by Charles F. Packer, acting as agent of the plaintiff.

The answer of Samuel A. Tolman, agent, was filed June 12, 1902. It admits the making and the purchase of the note, denies the loan was for \$25,000 or that the amount paid was \$24,966.35, as alleged, admits the delivery of the collateral securities, including the note for \$10,000, secured by trust deed on said lot twelve; denies that the complainant is or ever was the owner of said property; denies that he delivered up collateral in any amount without the consent of complainant; denies that he wasted or failed



to enforce collection; denies the making of the alleged contract with complainant, or that he agreed to turn back property to him; denies that the premises described in the bill were conveyed as consideration for any such alleged agreement; denies that the deed to the premises was given to him as collateral security; denies that the transaction was usurious; denies that he caused the encumbrance executed by Packer and wife to be foreclosed; denies that an accounting had been demanded or that he had refused to make one. It alleges that in May, 1890, the Park National Bank of Chicago was closed by the Comptroller of Currency and a Receiver appointed; that Charles P. Packer was appointed agent for the shareholders; that Packer, Cook, Jernberg and Stodder and others were shareholders; that the Receiver was unable to secure money from the assets with which to pay depositors and creditors, and that he, Tolson, was consulted from time to time by Packer and others about the affairs of the Bank; that the note was executed to pay him for his time and services, and raise sufficient money to pay the balance due depositors and creditors; that he was induced to discount said note and purchase it, deducting the amount agreed to be due him, and it was agreed he should have first lien upon all assets of the Bank which were then to go into the hands of Packer, as agent. That the note for \$10,000 secured by said lot twelve was delivered as additional security, and that Jernberg and Roberts hypothecated a small, and for the most part, worthless lot of real estate contract notes; that on March 1, 1893, Packer, Roberts, Jernberg and Stodder, having had some differences between themselves as to how the note for \$35,550 should be paid made their judgment ^{one} note, for \$10,530.38 and one for \$19,250.62, each payable to Packer, each authorizing confession of judgment; that in June, 1893, Jernberg became insolvent and made an assignment in the



County Court; that by leave of that court, he, Tolman, gave notice, according to the agreement and offered the collateral of Jernberg and Roberts at public sale; that notice was given to Packer, Roberts, Jernberg and Jernberg's assignee; that Packer attended the sale and the collateral was sold October 21, 1893, for the gross sum of \$2,100, all of which was well known to the complainant and has been ratified by her; that lot twelve in block two had been and was the homestead of Packer; that on or about July 19, 1894, Ida E. Mack and Julia E. Mack became indebted to the People's Building and Loan Association for \$10,000 to secure which said Packer and Ellen E. Packer, his wife, gave a mortgage on said premises; that the note for \$10,000 delivered as collateral to Tolman was secured by a junior mortgage on this property; that the first mortgage was foreclosed, and Tolman and complainant made defendants in the proceeding; that Tolman filed a cross bill setting up the execution of the note for \$25,500; that the decree entered in the case found the indebtedness to the loan association was a first lien for \$4064.26; that over \$25,000 was found to be due to Tolman on the said note for \$25,500 and \$13,150 was found to be due on said note for \$10,000; that a deficiency decree against Packer was entered in these proceedings for \$11,412.41; that no redemption has been made therefrom; that, he, Tolman, has been placed in possession by a writ of assistance; that he has paid a thousand dollars to redeem the premises from tax sales; that by these proceedings the rights of the parties have become adjudicated; that on July 21, 1894, one Charles Tebbets, a shareholder and creditor of the Park National Bank filed a petition in the U. S. District Court for the Northern District of Illinois, claiming a lien upon the assets of said Bank, then in the hands of Packer as agent of the shareholders; that the shareholders and Packer were made defendants thereto and answered; that Tolman filed a cross bill, claiming a lien in preference to Tebbets and all

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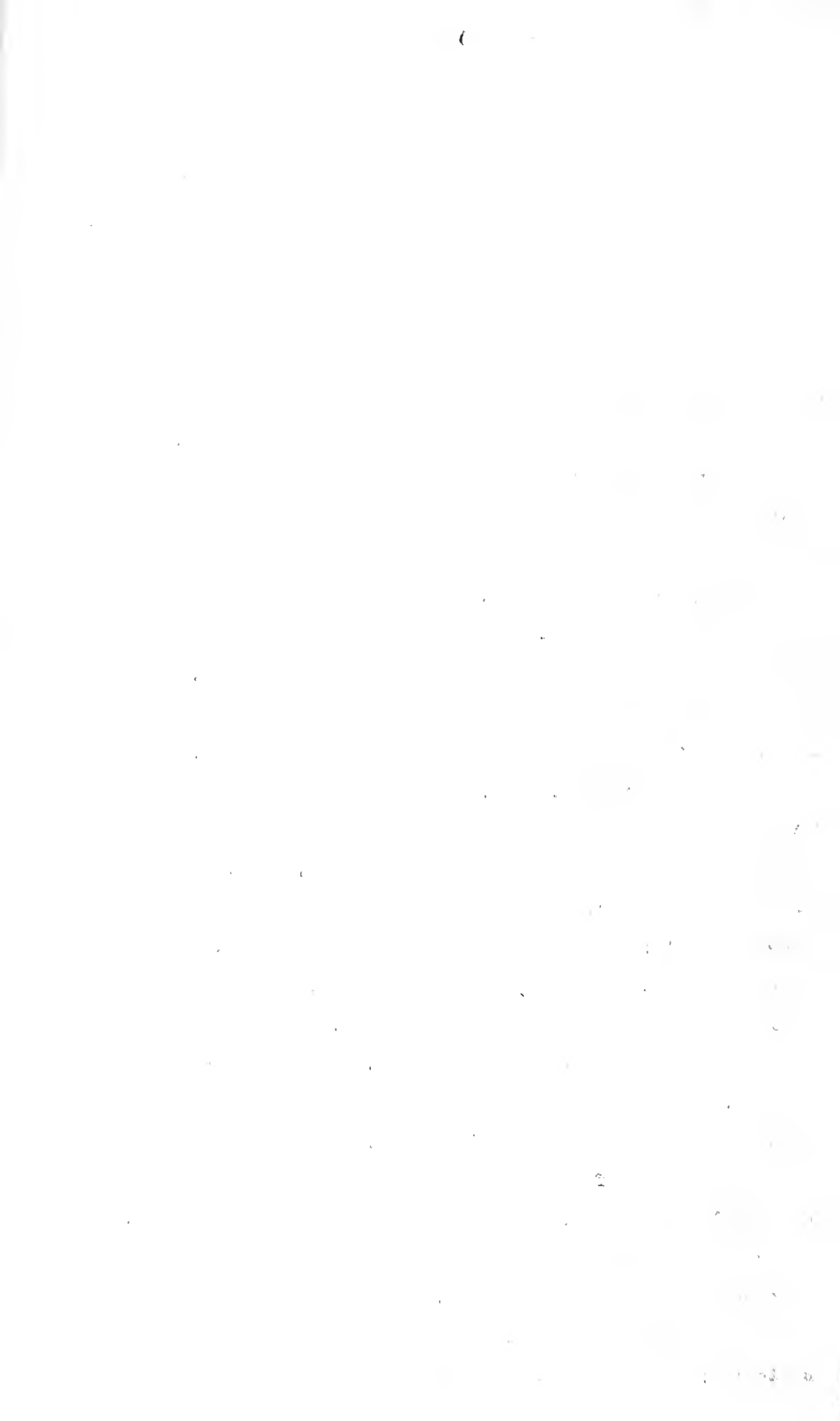
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other creditors; that on May 20, 1896, a decree was entered in favor of Tolman for \$22,430.43, and Packer was ordered to pay the same and that in default thereof all the notes, lands, etc., of said Bank should be sold; that it was therein determined that Packer, while agent, had collected over \$30,000 which he had not accounted for and had invested it in equities of the property described in complainant's bill as having been conveyed by her to Tolman; that when Packer was called upon to make an accounting, he tendered deeds for the same, stating that some of the property had been put in complainant's name for convenience; that she was his (Packer's) sister-in-law; that the notes, etc., set out in complainant's bill (other than the note for \$10,000) were the assets of the Park National Bank, purchased by Tolman for \$2100; that Packer claimed these assets so purchased were worth more than the amount due on the note; and that Packer then proposed to purchase said assets; and that a memorandum was prepared to that effect, which is set out in full; and that he, Packer, never signed it, but represented that he would desire to have the property conveyed to complainant instead of himself; that Tolman's solicitor said to Packer that when the money was paid Packer might have the assets delivered to whomsoever he might direct; that Packer did not comply with the agreement; that, he, Packer, secured complainant's attorneys to bring a number of suits in vain attempts to realize on these assets; that even after the agreement expired, he, defendant, told Packer he would be glad to receive the money due him and convey these assets, and defendant would now be glad if Packer would do so; that in February, 1901, Packer asked for a statement; that, he, Tolman, furnished such statement showing \$323.37 to his own credit; that he now would be glad to sell the assets according to this agreement; that complainant never owned the said lot twelve; that the same was conveyed to her by Packer to hinder and delay his creditors; and that he never received from her anything of value, except such

property as belonged to the Bank. The answer also pleads the statute of Frauds as a defense.

On November 3, 1908, complainant's solicitor made an affidavit to the effect that he had not theretofore had knowledge until October 27, 1908, that Packer claimed that as agent of the Park National Bank he had an interest in the collateral deposited by complainant with Telman and by leave of court on that day, an amendment was filed, in which complainant alleged that Charles F. Packer, as agent of the shareholders of the Park National Bank has and claims an interest in the collateral delivered to the defendant as security for the promissory note of \$55,500.00. On the same day Packer filed an answer, admitting "all the allegations of the bill as amended", and on December 11, 1908, evidence having been heard before the chancellor, (but none having been offered in behalf of defendant Packer, individually, or as the agent of the shareholders of the Bank) the court entered a decree, finding the execution of the note on August 20, 1891, its delivery to Telman on September 9, 1891; that the consideration therefore was genuine; that collateral security for the same had from time to time been delivered to Telman; that Telman had agreed with the complainant that whenever he was reimbursed for the money advanced, he would return to complainant the securities held by him for the payment of said advance. That the conveyances

made by complainant and defendant were in the nature of securities and should be considered as mortgages; that the bill was not a bill for a specific performance but rather in the nature of a bill for redemption of said securities; that there had been no adjudication of the questions presented by former decisions, and that the complainant was not guilty of laches. It was then forthwith ordered and decreed that an accounting be had "as herein provided", that the cause be referred to a master for that purpose; that the master should take the original amount of \$22,965.39 advanced on September 9, 1891, and allow interest from said date at 5% per annum on such portions of said indebtedness as remained from time to time unextinguished, crediting on said indebtedness all payments and credits which should be allowed therein; that the master should report if said indebtedness was overpaid, what and how much, and all credits and payments since it was overpaid, charging the defendant with interest at 5% per annum, on such overpayments, and the accounting should be brought down to include the date of the master's report; that an accounting should be had of all the securities at any time delivered to and held by said Tolman as security for said indebtedness, and that of such securities for said indebtedness now in existence and held by said Tolman, also if any of said securities are not held by said Tolman, that he file an account of those so missing; that the master or any party might apply for further directions as to the accounting, and that all questions not specifically determined and reserved for determination upon the entry of final decree therein.



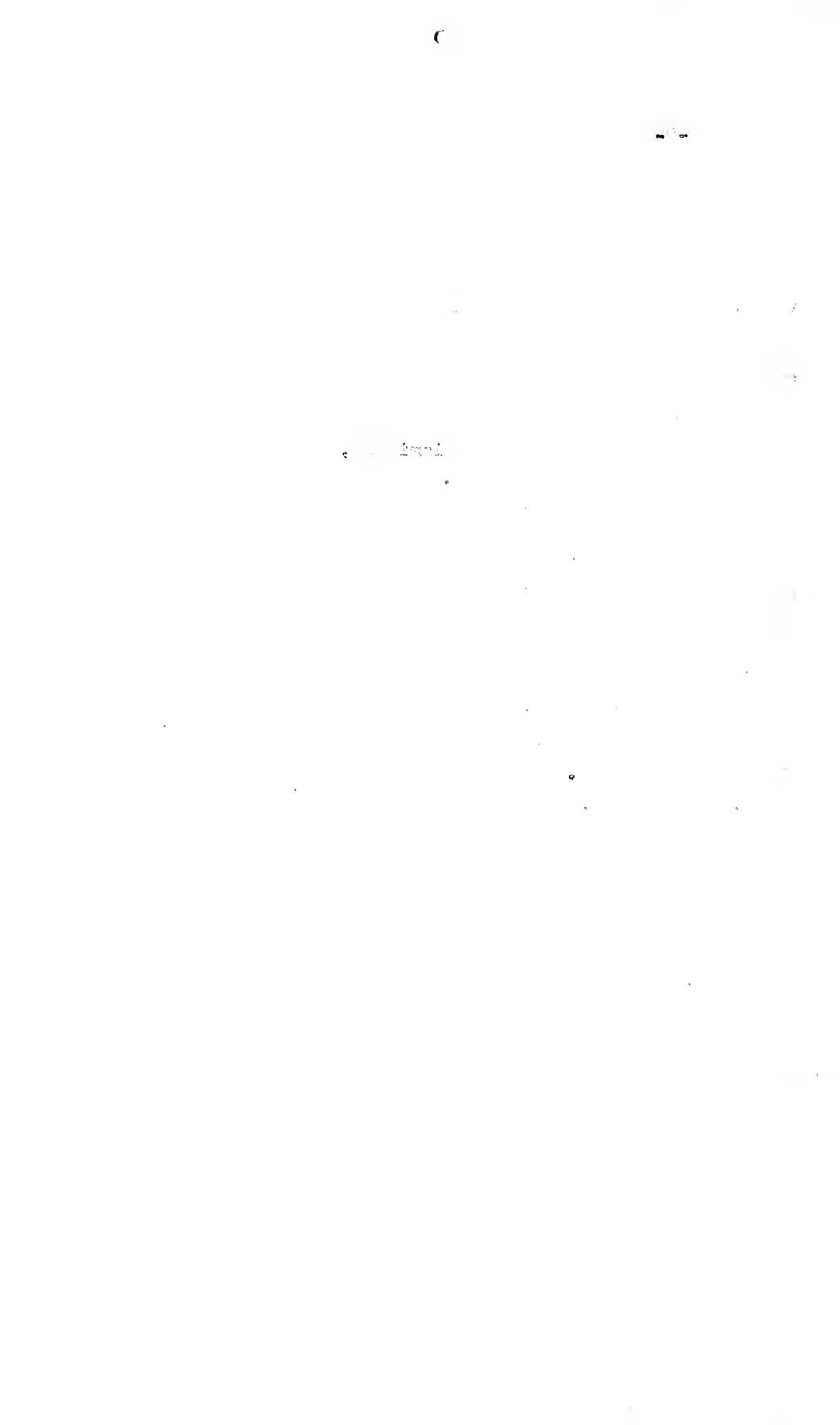
From this decree the defendant Samuel A. Colman prayed an appeal to this court, which was allowed and perfected, but upon motion of the appellee, Ida J. Backus, the appeal was dismissed because, as held by this court, it was interlocutory and not final. The case is reported in Harber v. Colman, 176 Ill. App. 123.

After the case was dismissed, and on July 23, 1913, the defendant Colman filed with the master a statement of his account, in which he claimed that there was due to him on the original note for \$25,550 a balance of \$4365.72. Thereafter he filed a written statement with the master, by which it was declared -

*****In order to save expense and delay of a long accounting and for the purpose of the present accounting under the complainant's bill, the defendant is willing to agree and does hereby agree that it may be considered that he has received the sum of \$22,965.35, advanced by him to the persons referred to in the complainant's bill, together with interest on said amount. Charles J. Backer delivered to this defendant a second mortgage or trust deed upon lot twelve, block two, Hyde Park, Cook County, Illinois, often referred to as the Lake Avenue property; that a first mortgage upon the said premises existed in favor of 'The People's Building & Loan Association.' That thereafter 'The People's Building & Loan Association' filed a bill to foreclose the said mortgage, and this defendant was obliged to and did pay the sum of \$5127.18 on the 23rd day of November, 1896, in addition to the loan above mentioned out of his own funds, to protect a second mortgage so conveyed to him. That this defendant thereafter foreclosed the second mortgage, and bought in the premises, and that he now owns and holds title to the said premises. ***

Afterwards a dispute arose as to the scope of the reference, which was by the master referred to the court. Thereupon the court entered an order interpreting the scope of the decree, in which it was found:

"Under the terms of the said decree heretofore entered by this court on the 11th day of December, 1900, it was not the intention of this court to grant to the complainant an relief by way of specific performance, but only by way of the redemption of the securities set out in the original and amended bill, and alleged therein to have been delivered by complainant to defendant under said contract of 1896; that the court allowed an accounting with regard to all of the securities received by the defendant, as security for the payment of said note, only for the purpose of ascertaining whether or not the said note had been paid with interest. That, inasmuch as it now appears from the



stipulation of the defendant Tolman, that he has received the principal, as aforesaid, with interest, the complainant is not entitled to an accounting with regard to collateral delivered to the defendant Tolman by any other person than complainant, or other than that set up in the original and amended bill, and alleged therein to have been delivered by complainant to the defendant under the contract of 1896 as further collateral security for the payment of said note.****

Thereafter, on May 29, 1915, upon a further controversy as to the scope of the reference, the court entered an order -

"*****that under the pleadings in this case, the defendant Charles J. Jucker is not entitled to an accounting with regard to any collateral alleged to have been delivered by him or by any other person or persons to said Samuel A. Tolman as collateral security for a note dated on or about August 29th, 1891, for the sum of \$25,500, set up in the complainant's original bill of complaint, and the court further finds that said defendant Jucker is not entitled to cross-examine the defendant Tolman in this case with regard to any such collateral alleged to have been delivered to said Tolman as security for the payment of said note by any person or persons other than complainant Ida J. Jack Barber; and the court further finds that the defendant Jucker has no other greater right to cross-examine the defendant Tolman, or to require any other accounting than that existing in the complainant Ida J. Jack Barber under the former order of this court."

Thereafter, on July 12, 1915, the defendant Jucker filed a cross-bill which on December 6, 1915, was amended, a demurrer having been sustained to it. In this amended cross-bill he set up that the amended bill of complaint was filed against him November 3, 1909, whereby it was alleged that as an individual and agent he had an interest in the collateral theretofore delivered to Tolman as security for the note of \$25,500.00, dated August 29, 1891; that he filed an answer, admitting the truth of said allegations. He also set up the decree of December 11, 1909, the subsequent order of the court construing that decree as heretofore recited, the stipulation, so-called, of Tolman that the debt was paid, to which stipulation neither he nor the complainant have ever consented; that contemporaneously with the negotiation of August 29, 1891, he, with Roberts, Jernberg and Stodder, deposited with Tolman as collateral thereto a large number of notes, mortgages and other property of

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great value; that Tolman thereafter represented that some of these properties were endangered by underlying liens; that Tolman pretended the security was insufficient, and that for the purpose of protecting the same, he, Locker, from time to time delivered or decided and conveyed to Tolman additional large amount of collateral; that further large amounts were deposited with Tolman by himself, Roberts, Jernberg and Stodder; that the same has not been returned or accounted for or the proceeds thereof; that the rights of Roberts and Jernberg had been assigned to cross-complainant; that Cook never deposited any collateral; that Stodder has an interest which can be determined only on an accounting, and that complainant and these are the only persons who now have any rights, title to or interest in any of said collateral or property which was described in exhibit A, attached to the bill; that by decree of the U. S. court, Tolman had acquired a lien on all the assets of the First National Bank, a schedule of which is set forth; that Tolman foreclosed the same in that court, obtaining the decree from which cross-complainant was about to appeal, when on September 5, 1896, in consideration of the pending appeal and the deposit of further collateral upon the payment of the indebtedness, he, Tolman, promised he would surrender and turn over to cross-complainant all property of every kind and description deposited by Locker, Roberts, Jernberg and Stodder, and that he, Tolman, would account for the same with all increment; that a description of this property is solely within the knowledge of Tolman; that Tolman agreed he would, through sale, acquire all the title to the assets of the bank, and would pay the proceeds thereof to cross-complainant; that Tolman has failed to keep said promise; that Tolman wrongfully neglected to pay off underlying liens as promised, and allowed the collateral pledged to be wasted; that the original bill was filed December 4, 1901, but the fact of

the payment of the original note has only been disclosed by the hearing before the master; that Tolman has always denied that the original indebtedness had been in fact paid, that the hearings have shown that these denials are false, that cross complainant's rights to redeem his collateral can only be determined through a full accounting; that Tolman has fraudulently concealed payments made upon the indebtedness; that he believes it will be shown upon an accounting that Tolman has received \$500,000.00 in excess of the indebtedness; that Tolman holds as trustee a large number of lots to which he took title as trustee, but which have been sold and disposed of by him; that he is liable to account therefor, and for others which he still holds in trust for cross complainant.

The cross bill prays an answer from defendants Samuel A. Tolman, Ida E. Mack Barber, George F. Stedder and John A. Davidson, Jr.; that an account may be taken, and if the indebtedness has been paid, Tolman may be ordered to deliver same to cross complainant.

To the cross bill on January 10, 1916, Tolman filed a general and special demurrer setting up, with other reasons, that the allegations of the cross bill were inconsistent with the answer of Charles F. Packer filed in said cause and with the allegations of the original bill admitted by him to be true, and which were, in fact, verified by him as agent for the complainant, Ida E. Mack Barber. Second, that the cross bill did not set up or allege matters germane to the original bill or the relief sought under the terms of such original bill. The special demurrer also set up laches of Packer appearing upon the face of the bill. The demurrer to this bill was sustained. The master thereafter reported, finding that, -

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"Prior to the 13th day of November, 1896, when the defendant Charles F. Packer, as agent etc., assumed to convey certain property (involved in this litigation) to the defendant Tolman, the entire indebtedness due the said Tolman on the note for \$22,965.35 had been paid, and that the complainant was entitled to have the several pieces of property involved herein, conveyed and delivered to her at once * * *."

The seventh finding of said report was as follows:

"Complainant urges that she is entitled to a finding as to many thousands of dollars, alleged to have been collected by the defendant on collateral deposited to secure the said original loan, as to many thousands of dollars alleged to have been received by him for sales of part of the collateral, and as to many thousands of dollars of collateral upon said loan that it is alleged are not accounted for, but I make no finding upon these claims, because under the reference I am directed to limit myself to the items noted."

To this report Charles F. Packer, counsel . Tolman and the complainant filed objections which were overruled, and the cause was heard by the chancellor on these objections which were ordered to stand as exceptions before him. Appellant has not furnished any abstract of these objections or exceptions, which upon the hearing were also overruled by the chancellor, and the decree entered. The decree finds:

"That prior to the 13th day of November, 1896, when the defendant Charles F. Packer, as agent, etc., assumed to convey certain property to the defendant Tolman, the entire indebtedness due to the said Tolman on a certain note of \$22,965.35 had been paid, and that the complainant was entitled to have the several pieces of property involved herein, conveyed and delivered to her at once. * * * That the property known as 4747 Lake Avenue, described as lot twelve, block two, in Hyde Park, should be decreed by the defendant Tolman to the complainant; that said Tolman is entitled to a lien upon said property, however, of the sum of \$5127.18, less the sum of \$3156.78/100ths dollars, thereafter paid to Tolman by Charles F. Packer, which last sum should be credited to the complainant, making a net lien in favor of the defendant Tolman upon the said premises of \$1970.40. That the defendant Tolman should likewise be credited with interest on this sum from the 4th day of September, 1900, at the rate of 5% per annum, down to this date, and should be credited also with all payment of taxes and special assessments made by him since that date with interest at 5% from the date of the respective payments, down to this date; that the said defendant, Tolman, should be charged with the rental value of the said

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property from that date, with interest, at 5%.

The court further finds the complainant is entitled to the property known and described as lots ten and eleven, in block three, in Edwards & Dunn's addition to Irving Park, in Cook County, Illinois, on payment to the said defendant, Tolman, of all monies paid by him for taxes and special assessments on said premises, with interest at 5% per annum upon such amounts from dates of payment."

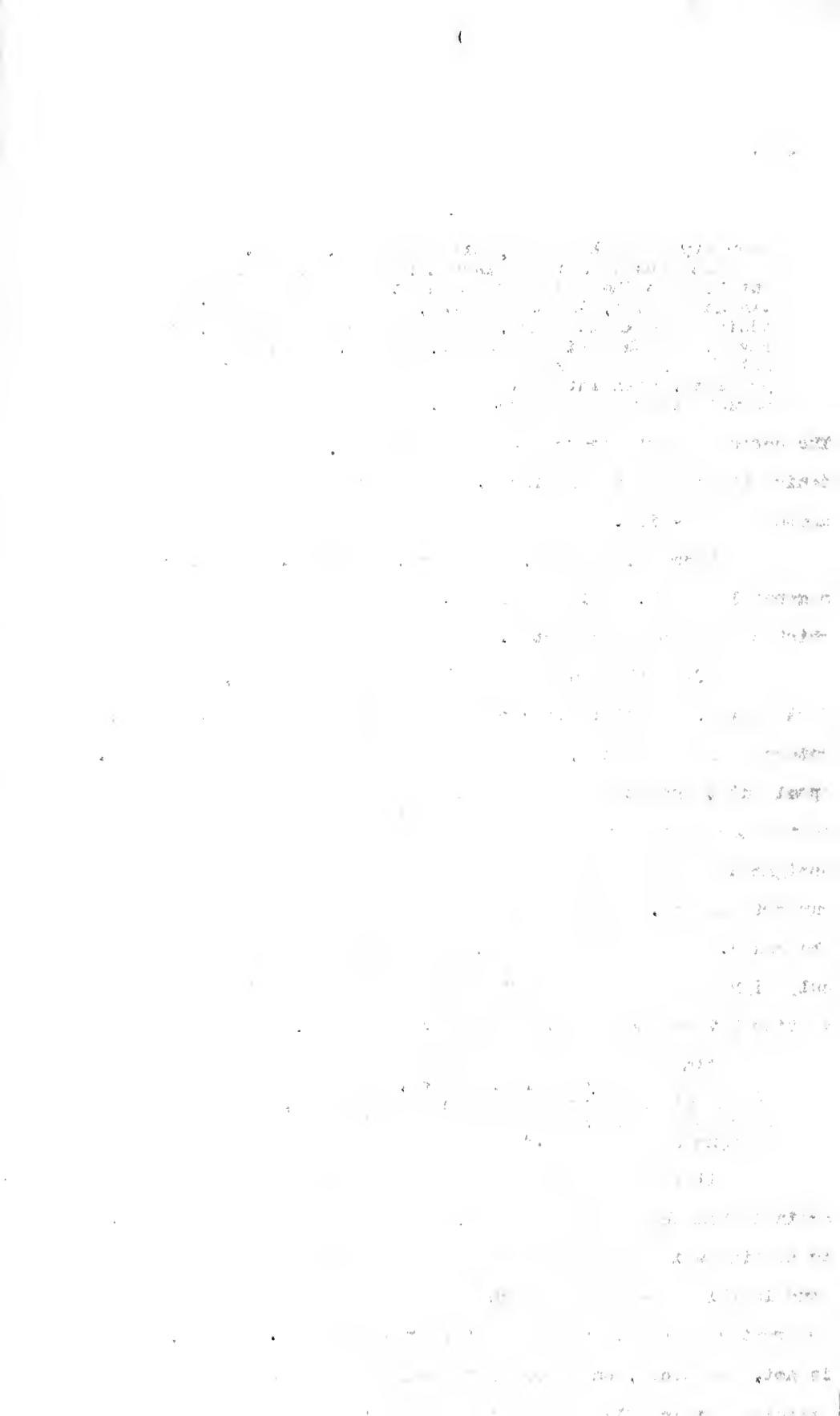
The decree directs conveyances according to these findings and denies the motion of Charles P. Packer for leave to refile the amended cross-bill.

From this decree, defendant, Daniel P. Tolman, prayed a general appeal. Said Charles P. Packer also prayed an appeal which has not been perfected.

After the cause was docketed in this court, Ellen Mack Packer, administratrix of the estate of Charles P. Packer, entered her appearance, and obtained leave to file cross errors. Appellant thereafter entered a motion to vacate the order of leave theretofore entered and to strike from the files her assignment of cross errors and briefs theretofore filed in support thereof. This motion was reserved until the hearing of the cause. The argument for the motion in substance is that the only right of a party to assign cross error is derived from section 107 of the Practice Act which provides:

"In all cases of appeal to the Supreme Court or Appellate Court or writ of error, the appellee or defendant in error may assign cross errors, and the court shall dispose of the same as in other cases of assignment of errors."

It is argued that by "appellee" is meant the party against whom the appeal is taken; the party who has an interest in setting aside the judgment and it is pointed out that the bond in this case does not run to Packer; that it ^{is} therefore apparent he can have no interest in sustaining the decree, and is not, therefore, an "appellee" within the meaning of that statute. Citing Oliver v. Wilhite, 201 Ill. 564.



We think the facts here are clearly distinguishable from those controlling in that case. The decree there was reversible as it is here, but the appeal there taken was limited to specific parts of the decree, in which the parties assigning cross errors, were in no way interested. Here the appeal is a general one.

Packer filed objections to the master's report, and exceptions, which were overruled, and the decree denied specific motions made in his behalf. The appeal was therefore "against" him, as well as others. Matt v. Barnhill, 212 Ill. 109.

The motion will be denied.

The decree appealed from was entered October 1, 1918. Appellee, Ida E. Mack Barber, contends that this decree, like that of December 11, 1909, (Barber v. Tolman, supra) is interlocutory, and that this court is, therefore, without jurisdiction to entertain the appeal. It is argued that the amount of taxes and special assessments paid, and the dates thereof, and the rental value of the premises with which appellant is charged, should have been determined. That it will be necessary to determine these facts before final relief can be granted, ^{which} is only conditional, until such facts are ascertained and adjudicated.

We think in this case the decree adjudicates the substantial rights of the parties on the issues raised by the pleadings, and clearly fixes and determines the controlling principles by which the further accounting ordered should be determined. All the substantial rights of the parties, as put in issue are determined by the decree, and the further matters on which evidence is directed to be taken, are merely incidental to the execution of it.



It is not always easy to determine under the rules announced when a decree is interlocutory and when final, but we think our view that this one is a final decree is sustained by Barber v. Tolson, supra, and the following additional authorities. De Greene v. Gossard Co., 336 Ill. 73; Allison v. Drake, 145 Ill. 500; Fisar v. Fisar, 231 Ill. 75; Green v. Kennedy, 224 Ill. 526; Wahl v. Wahl, 220 Ill. 182.

While there may be language in some cases seeming to sustain the contention of appellee, Barber, we think the facts in such cases easily distinguish them from this case, and we therefore hold this court has jurisdiction to review the decree.

It is urged by appellant that the decree is erroneous in so far as it directed the defendant Tolson to deed said lot twelve in block two, in Hyde Park, and lots ten and eleven in block three, in Edwards & Dana's addition to Irving Park, because as it is said, this relief was given on the theory that the bill was one for redemption of said premises, while appellant contends it was, in fact, a bill for the specific performance of an alleged contract between complainant and defendant, that such conveyance would be made upon the payment of the indebtedness for which the property was pledged as collateral.

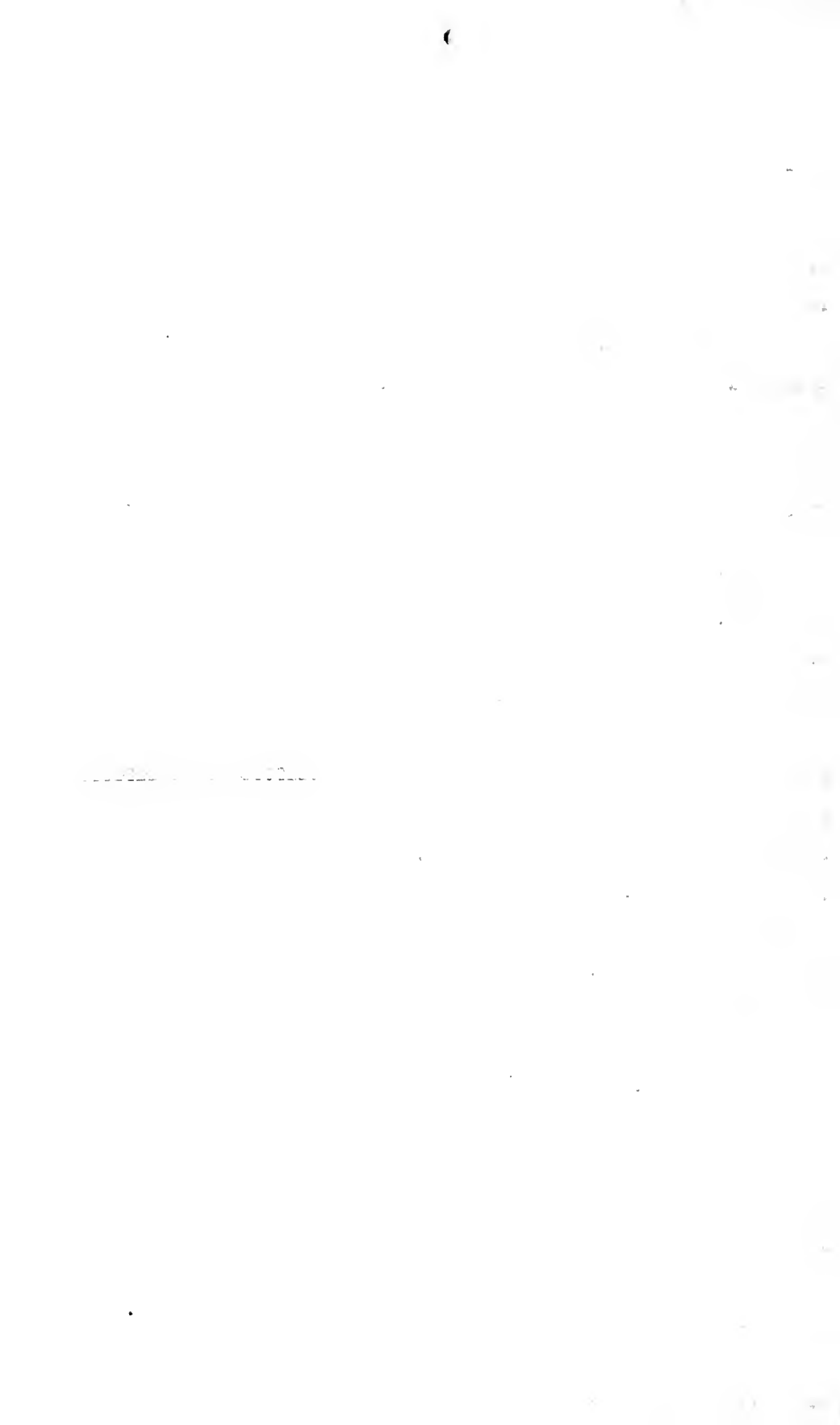
Appellant invokes the well known rule in equity that a complainant will not be allowed to state his case one way in the bill and recover on another and different case made by the evidence. That rule needs no citations of authority to sustain it, but we do not think the decree here entered can be successfully attacked on that ground. An examination of the bill, we think, shows conclusively, that it is not technically a bill for the specific performance of a contract. It prays for no such relief, and the promise to turn over the property to the person entitled

upon the payment of the debt was one which the law would imply in the absence of any contract under the facts as here found.

It is perhaps also true that the bill could not technically be called a bill to redeem. It does not seem to be framed upon that theory. It alleges the delivery of the property as collateral security for an alleged indebtedness which it charges on information and belief to have been paid. It prays a discovery of the facts which were peculiarly in the defendant's knowledge, and preliminary injunction, pending such discovery, and an accounting with the return of such property to which the complainant was clearly entitled if the facts stated in the bill were true.

The finding of fact by the chancellor, which as we understand this record is here unchallenged, ~~XXXXXXXXXXXXXXXXXXXX~~ is that at the very time this collateral for the supposed indebtedness was deposited with defendant, the indebtedness had, in fact, been paid in full. In view of such finding complainant was clearly entitled to a return of the property pledged, and an accounting with reference to it, and we are not disposed to deny that right upon any merely technical distinction as to the name which shall be applied to the bill in which she sets forth her rights and prays for relief.

We hold the relief granted was not inconsistent with the case stated in the bill and made by the pleadings. Nor will the further contention of appellant that complainant could not recover because the surplus of proceeds in a sale of collateral over and above the amount of the indebtedness belongs to the pledgor, who deposited the collateral, (although, undoubtedly, a correct statement of the law) avail here for the reason that in so far as lot twelve in block two is concerned, it appears from



the record that it was either the property of the complainant Mrs. Barber or of Charles P. Packer, individually, or Charles P. Packer, as agent of the shareholders of the Park National Bank; that each of these are parties to the record, and the defendants (other than Tolman) by their answer admitted that Mrs. Barber was the owner and lawfully entitled to the same. The defendant Tolman is protected by that answer, and has no standing here to complain of the decree in that respect. Schwartz v. Ritter, 186 Ill. 208; Farmen v. Borders, 110 Ill. 238.

Appellant also invokes the Statute of Frauds (Jones & Addington's Annotated Statutes, Chap. 59, Pars. 1 and 2) and calls our attention to the undoubted rule that in order to take a case out of the Statute a parole contract should be clear and certain in its terms and established by testimony of an undoubted character, which is clear, defined and unequivocal; that acts relied on to defeat the Statute must be done unequivocally under the identical contract sued on and for the sole purpose of performing it. These propositions of law are undisputed, but we think, have no application to the facts of this case as found by the master, decreed by the court, and unchallenged by any of the parties. The Statute of Frauds cannot be invoked to perpetrate a fraud. Milkie v. Miller, 171 Ill. 556; Scanlan v. Scanlan, 134 Ill. 630; Union Mutual Life Ins. Co. v. White, 106 Ill. 67.

Appellant next argues that the plea of res adjudicata was applicable. The evidence is, we think, insufficient to establish this defense, and moreover, the stipulation of defendant of record, that his debt was, in fact, paid after the filing of the bill would constitute a waiver of any such defense. Crutlish v. Shenandoah Valley Ry. Co., 45 N. Va. 567; 24 Amer. & Eng. Enc. of Law, 2nd Ed. 836.

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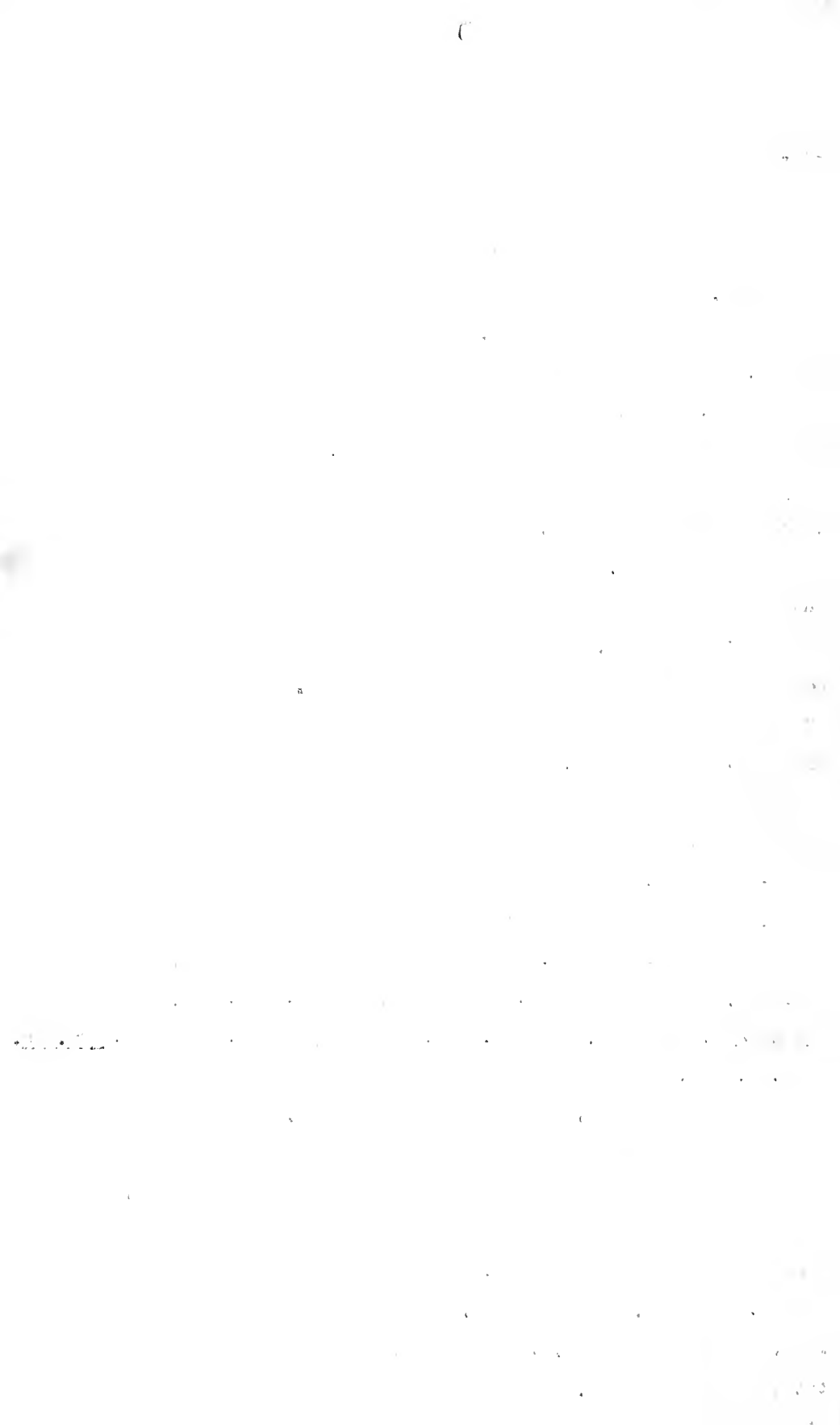
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We think appellant's assignments of error cannot be sustained.

Pending this appeal, both Packer and Wolman have deceased, and their personal representatives have been substituted as parties. Ellen Mack Packer has been substituted as agent for the shareholders of the Park National Bank.

It is the contention of the administrator of Packer's estate and his successor, as agent of the shareholders of the Park National Bank, that the court erred in the order limiting and restricting the scope and purpose of the decree of reference theretofore entered; that the decree in that respect was final and could not be changed at a subsequent term, and it is claimed that in an accounting which has proceeded to a decree that the parties do account, it is not necessary for defendant to file a cross bill to entitle him to a decree in his favor for any sum of money which may be found due to him from the complainant or co-defendant. That is the unquestioned rule where a decree to account is rendered against others in favor of one of the partners or joint owners. Story on Equity Jurisprudence, Vol. 1, page 496; Acme Lumber Co. v. McGuire, 41 Ill. App. 309; Wilcoxon v. Wilcoxon, 111 Ill. App. 90; Corcoran v. Chesapeake Ry. Co. 94 U. S. 741.

But we fail, as appellant points out, to find in this decree any direction that defendant Packer shall account or that the defendants and complainant shall account with each other, nor was there any evidence given by Packer on the hearing before the chancellor which would have justified such an order or decree. Moreover, we think that, as the decree of December 11, 1900, was interlocutory, it was clearly within the power of the trial court to modify, alter or change it at any time before the final decree was entered. Jeffrey v. Robbins, 167 Ill. 375;



Seil v. Mulvaney, 262 Ill. 195.

That the general rule is that affirmative relief can only be granted upon a cross bill praying for it, is conceded, and while there are certain exceptions such as partnership accountings, accounts between co-owners, junior incumbrancers in foreclosure proceedings etc., we know of no case, and think none will be found in this State where that rule has been extended, so as to include, as here contended for, matters and things which are without the scope of complainant's bill.

Wilcoxon v. Wilcoxon, 199 Ill. 344; Warr v. Warr, 121 Ill.

App. 90; Norman v. Middleworth, 64 Ill. 11; Price v. Blackman, 65 Ill. 366; Edwards v. Hain, 4 Conn. 142.

We think the court did not err in entering said order, interpreting the original decree, nor in the then state of the record, in limiting defendant Backer in his right to cross examine defendant Tolman.

It is stated in the briefs that the principal reason, apparently, for which the chancellor sustained the demurrer to the cross bill, was, that in his view the allegations of the cross bill were inconsistent with the answer of the cross complainant, in which he admitted that the allegations of the original bill of complaint, as amended, were true.

In so far as the allegations of the original bill refer to the same collateral and property as that set up in the cross bill every allegation of the right of complainant in and to such property is clearly inconsistent with the allegations of the cross bill, which sets up that cross complainant is the true owner of and entitled to the same.

On the other hand, in so far as the collateral described in the cross bill is not the same as that described by the cross complainant in the original bill, it would seem

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that the subject matter of the cross bill is not the same as that of the original bill, and that the cross bill in that respect is not germane to the original bill. We are aware of the difficulty arising in applying the general rules on this subject to specific cases. Each case must be determined upon its own facts and each must, undoubtedly, be left to the discretion of the court, which discretion should be exercised in such a way as to do justice to all the parties. 10 C. L. 484-5.

But if we have any doubt as to the correctness of the court's ruling for that reason we cannot doubt that the demurrer to the cross bill was properly sustained on account of laches on the part of the cross complainant, which was apparent upon the face of his cross bill. This point was properly raised by the demurrer. Maxwell v. Foley, 127 Ill. 463, and in considering the same it was the duty of the court to consider all the pleadings in the case. Harding v. Olson, 76 Ill. App. 436; Eliason v. Russell, 13 Ill. 32.

As already stated, the amended cross bill, to which the demurrer was sustained, was filed December 6, 1915. The note out of which the controversy arose was dated August 20, 1891, and by its terms fell due six months from date. The original bill was filed December 4, 1901.

The original bill, and all amendments thereto, were verified by the cross complainant. For more than fourteen years after Mr. Packer had sworn to facts which were clearly sufficient to put him on notice, and after he was thus put in a hostile attitude towards defendant Tolman, he failed to assert his alleged rights. The excuse stated in the bill for this delay is that he did not know until it was proved upon the hearing before the master that the original note had been,

in fact, paid, but the original bill, which he verified, alleged that it had been paid, and the fact that Tolman, under oath, made denial thereof was therefore notice to him that if he wished to establish such fact (and it must have been apparent to him that all his rights depended upon his ability to make such proof) it was time for him to present his case to a proper tribunal. It is true that Courts of Equity are not necessarily bound by statutes of limitations. They will, at all times, do the thing that is equitable and just, but it does not seem to us, upon a review of this record, that it would be fair or just to allow the administrator of Packer to now relitigate with the administrator of Tolman, in part the same issues which have already been litigated between Mrs. Barber and Tolman, with Packer acting as her agent. He must have had notice of every step taken in the litigation. For fourteen years he slept upon his alleged rights. The allegations of the cross bill are, we think, clearly insufficient to excuse his laches which is apparent from an examination of the pleadings. Ator v. Smith, 245 Ill. 71, 2.

We, therefore, conclude the court did not err in sustaining the demurrer to the cross bill, nor in denying the motion of the cross complainant for leave to refile it. We find no error in the record, which would require a reversal of this decree, and the same will, therefore, be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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IDA E. MACK BARBER,
Appellee,

vs.

SAMUEL A. TOLMAN et al.

On Appeal of SAMUEL A. TOLMAN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

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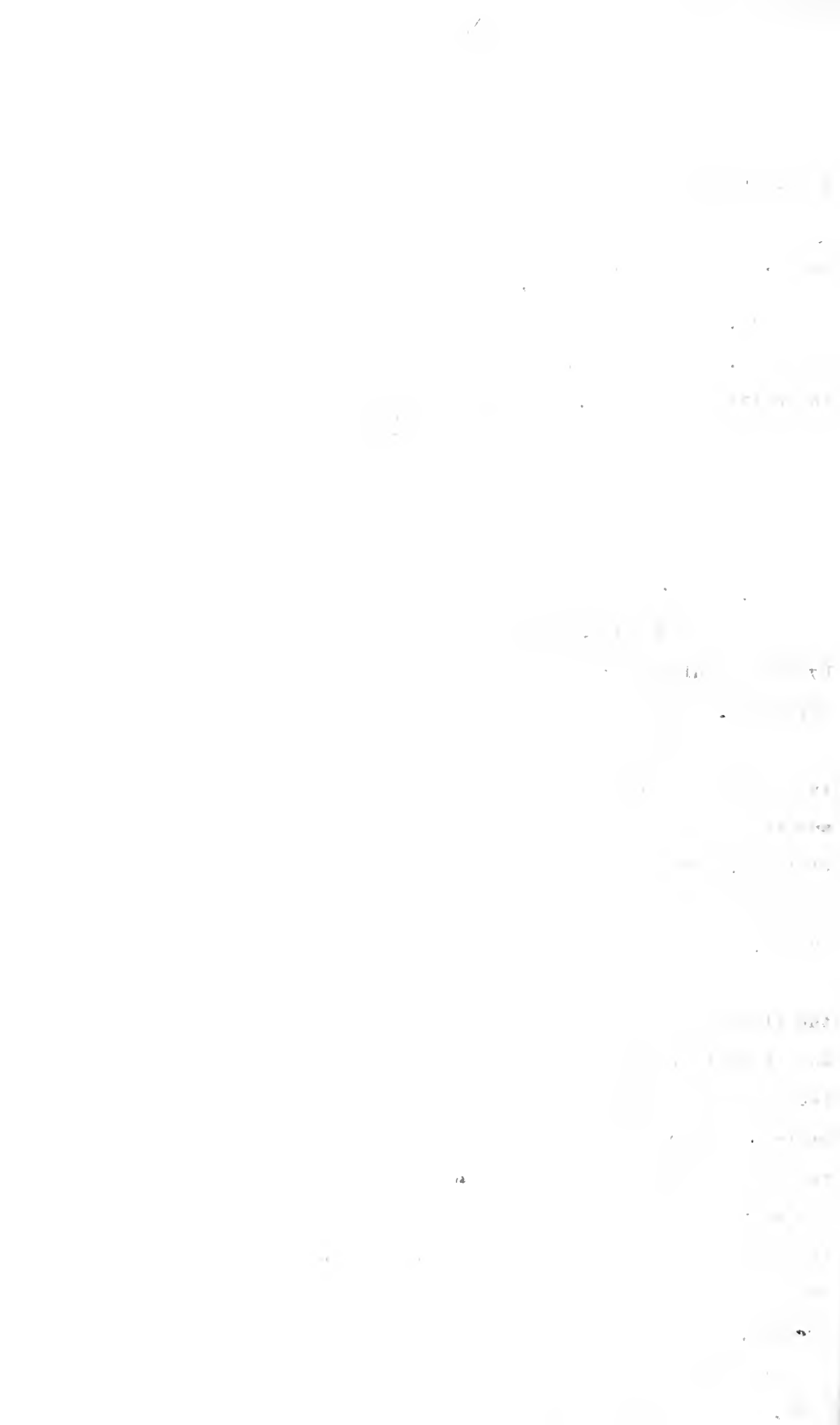
PETITION FOR A REHEARING.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Petitions for rehearing have been filed in this case by the administrators of the respective estates of Samuel A. Tolman and Charles F. Packer.

It is contended by appellant that the decision of the court is based upon "an erroneous assumption of fact," and it is said that the court apparently assumes that the complainant, Ida E. Mack Barber, conveyed to Tolman an interest in the real estate which the decree directs shall be conveyed to her.

We did not so assume, but on the contrary followed the findings of fact as stated in the decree of November 3, 1909, and October 1, 1918. These findings are to the effect that when Packer conveyed the property to defendant Tolman the entire indebtedness due to Tolman on the original note had been paid; that the defendant had agreed with the complainant that whenever he was reimbursed for the money advanced he would return to complainant the securities held by him, Packer, the only party who would have any standing to question complainant's right in this respect, answers the bill, admitting its allegations both for himself and as agent of the shareholders of the Park National Bank. That answer and admission not only binds Packer individually



and as agent, but protects Tolman, so that he has no standing to complain.

The findings of fact have not hitherto been contested by appellant; indeed, as pointed out in the opinion, he did not even abstract the exceptions to the master's report.

It is also urged by appellant that lots 10 and 11 in Block 1 in Edward & Dana's Addition to Irving Park were part of the property which was sold to Mr. Tolman at public sale in 1896 under the order of the United States District Court, and that for the purchase price of this property Tolman has accounted in the account filed by him before the master, and that the sum was applied by Tolman on the indebtedness due from Packer, Jernberg and others to him.

Appellant says: "In other words Tolman purchased this property and paid for the same, and applied the purchase money on the indebtedness due him ****." A decree, therefore, that Tolman be now compelled to transfer the lots in question to Mrs. Barber would result in this anomalous position, viz - that the indebtedness from Packer to Tolman was paid in part by a sale of the lots in question by the Federal District Court to Tolman, and having been thus paid, the property so sold to Tolman and for the purchase of which he has accounted will be taken from him and retransferred to a person who never had or claimed any interest therein, except under an alleged contract in 1896, which was not proven."

The record as we understand it does not sustain this statement, but on the contrary the decree finds as a fact that the whole indebtedness to Tolman had been paid prior to the confirmation of the sale of assets of the Park National Bank to



Tolman under the decree of the U. S. District Court.

The petitions for rehearing will be denied.

REHEARING DENIED.

Barnes, P. J., and Gridley, J., concur.

Barney J. T. and family, 1880

150 - 25404

ASSOCIATED FRUIT COMPANY,
a corporation,

Appellant,

v.

JOHN P. O'BRIEN,

Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

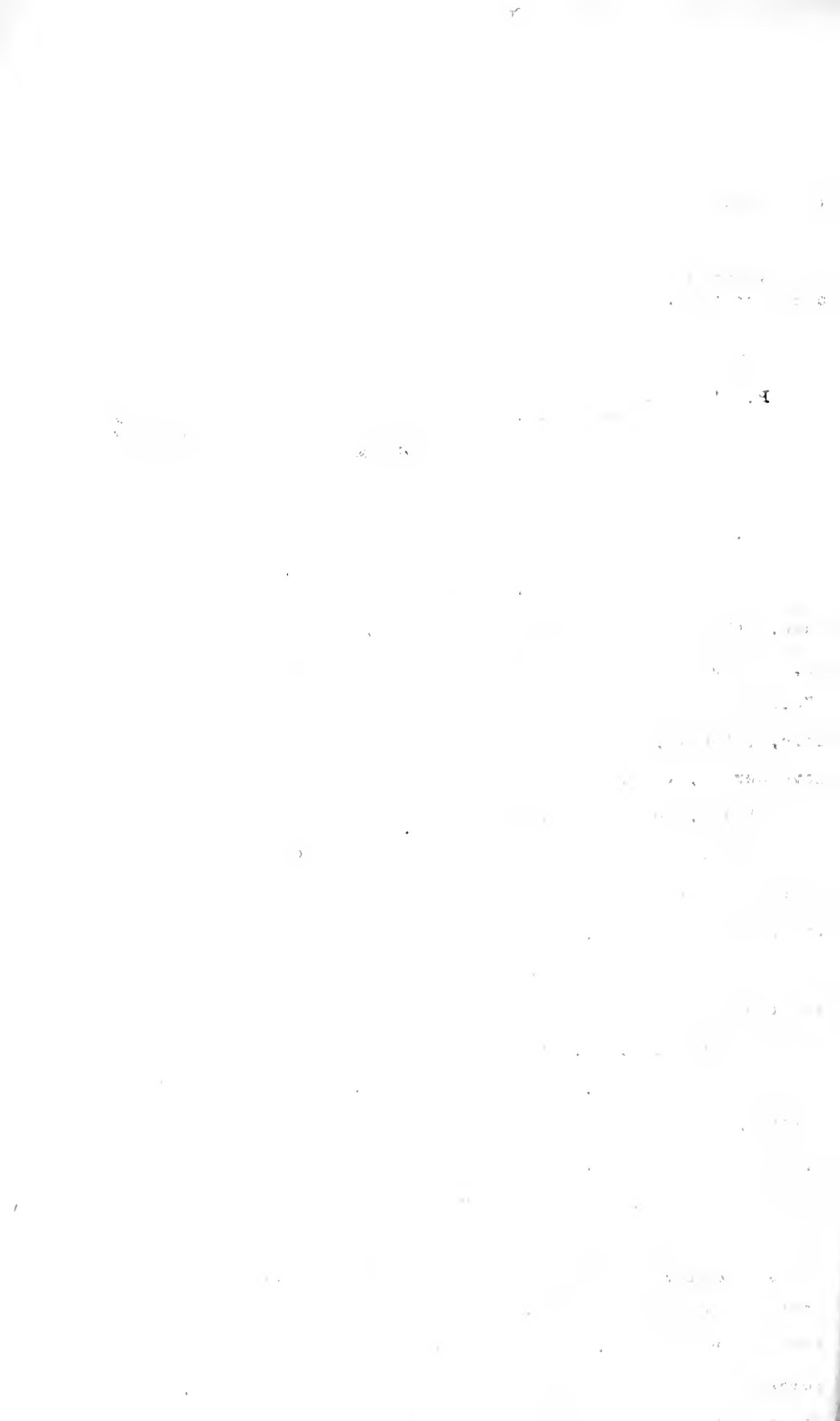
219 I.A. 653

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant, who was plaintiff in the trial court, sued, alleging that on November 6, 1918, he sold the defendant 39,000 pounds of potatoes at \$1.90 per hundred, less freight of \$72.37; that the potatoes were to be delivered in a car at Aurora, Illinois; that these potatoes were delivered there about November 20, 1918, and were inspected by the U. S. Department of Agriculture, but that defendant refused to accept and pay for the same; that the car of potatoes was then consigned to the nearest market for merchandise of that kind, and sold at a loss to plaintiff of \$307.00.

Plaintiff also set up in his statement of claim a written finding by the U. S. Bureau of Markets that the potatoes would grade "U. S. No. 1;" and a letter from the Enforcement Division of the U. S. Food Administrator, dated January 27, 1919, notifying the defendant that the potatoes were "U. S. Grade No. 1," as per agreement, and that defendant should be held responsible for the loss.

The affidavit of merits denied the defendant owed any sum whatever, moved to strike the exhibits set up in the statement of claim purporting to show the acts and doings of the Food Administration, denied the making of the contract or the purchase of the potatoes as alleged, but set up that he, the defendant, bought a car of "Fancy King potatoes," which were to

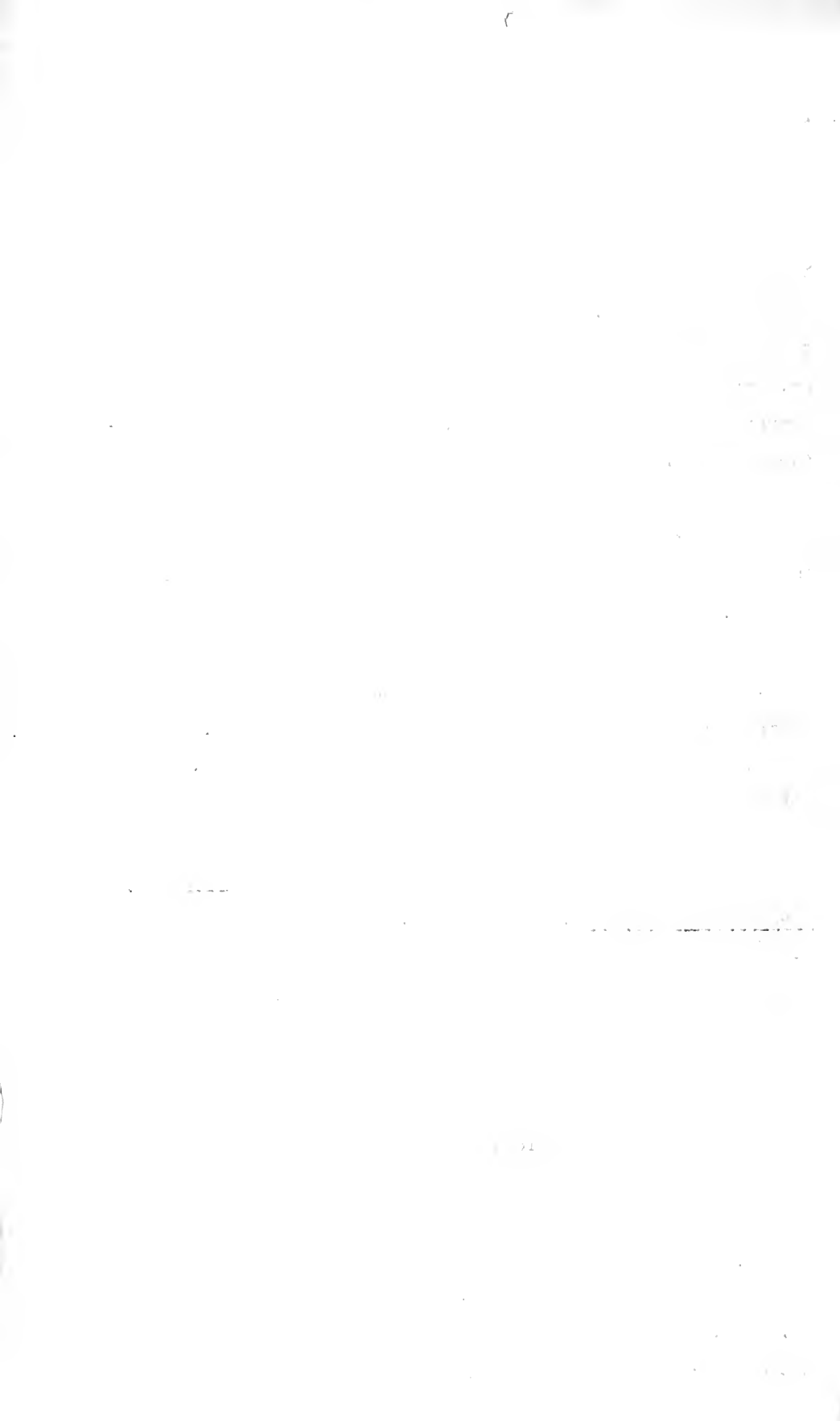


be delivered at Aurora; that the plaintiff tendered a car of potatoes at Aurora, which were not "Fancy King potatoes," but on the contrary showed blight and rot and other defects; that he, defendant, was at all times ready and willing to take "Fancy King potatoes" as agreed, but plaintiff failed and refused to deliver such potatoes.

The case was tried by the court without a jury, and evidence submitted in behalf of the respective parties. The finding was for the defendant and judgment was entered thereon.

It seems to be the contention of appellant that because the U. S. Food Administration, through its Division of Enforcement, rendered a decision on January 27, 1919, holding that the car of potatoes was of a certain grade No. 1; that defendant should have been held to its original contract; that this amounts to "an award" as binding on the parties as a written contract. In this connection we are cited to the U. S. v. The Pennsylvania Coal Co., 256 Fed. 705, where the validity of the U. S. Food Administration Act was upheld in a case brought thereunder for profiteering. That case has no application to the facts which appear here. Indeed the decision of the Food Administrator, which is in evidence, states, "We intervene to prevent food from spoiling, incidentally we try to prevent obstruction of transportation. Where the goods have actually been handled or have not been shipped, the foregoing reasons for our intervention do not exist. We are not a collection agency; the courts are the proper tribunals to settle disputes.""

The Rules of the Food Administration, dated June 10, 1918, are in evidence, but we find nothing in them or in the Act creating it which would indicate that the Food Administration



had any power to pass on or determine the rights of the parties to this suit. Since it is conceded that both the parties are and were residents of Illinois, the Uniform Sales Act, Hurd's Revised Statutes, 1917, chapter 120, would be applicable, and section 4 of that Act would prevent a recovery by plaintiff because the contract sued on involved the sale of merchandise of \$500.00 or upwards, and there was no memorandum of the transaction as required by that section. This defense is argued but was not set up in the affidavit of merits.

However, the finding of the trial court, which saw the witnesses and heard their testimony both as to the terms of the contract and the quality of the potatoes tendered, was in favor of the defendant. We have examined the evidence and we think it sustains the finding of the court. The judgment will therefore be affirmed.

AFFIRMED.

Barnes, J. J., and Gridley, J., concur.

MARY K. CARMODY, by her next
friend, May B. Carmody,
Appellee,

vs.

HADFIELD ICE CREAM COMPANY,
a corporation,
Appellant.

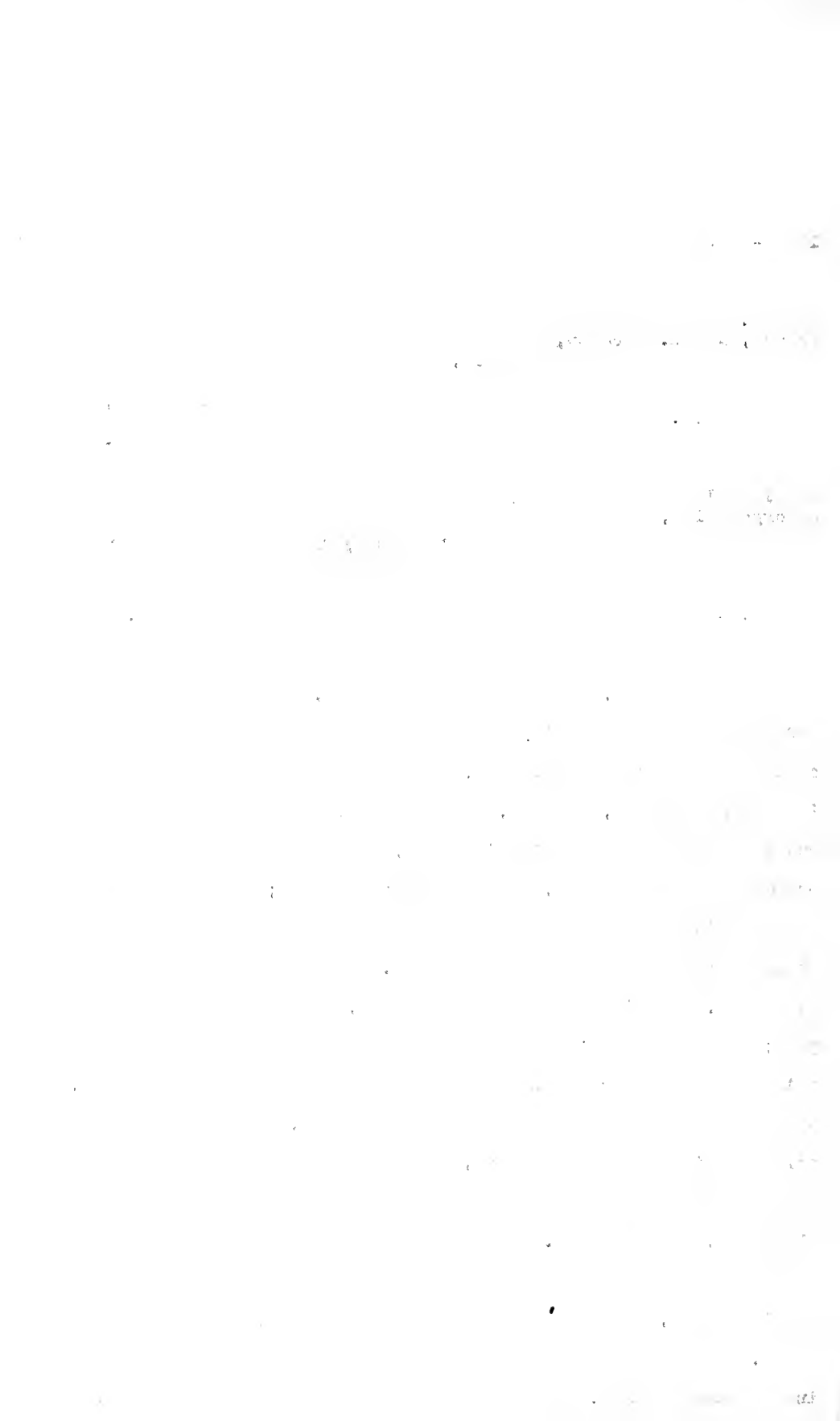
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

219 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellee, who was plaintiff below, brought suit against appellant in the several counts of her declaration, alleging that on the 9th day of August, 1917, the defendant was engaged in the ice cream business, and was, at that time, driving certain horses and a wagon in a southerly direction, in the alley between Montrose avenue and Buena avenue, in the City of Chicago; that plaintiff was standing near a gate adjacent to the alley, in the rear of the premises known as 4335 Kenmore avenue. That a certain other horse and wagon, used in the delivery of fruit, was standing near to the gate; that defendant failed to perform its duty to drive through said alley with due care, but carelessly and negligently managed, operated and controlled said horses and wagon, so that said wagon collided with said other wagon, and the horse attached to the fruit wagon was thrown against the gate, which caught the hand of plaintiff, injuring her.

The defendant filed the plea of the general issue and special pleas, which special pleas were, however, afterward withdrawn. The cause was tried by a jury, which found for plaintiff in the sum of \$2500. The court required a remittitur of \$1500,



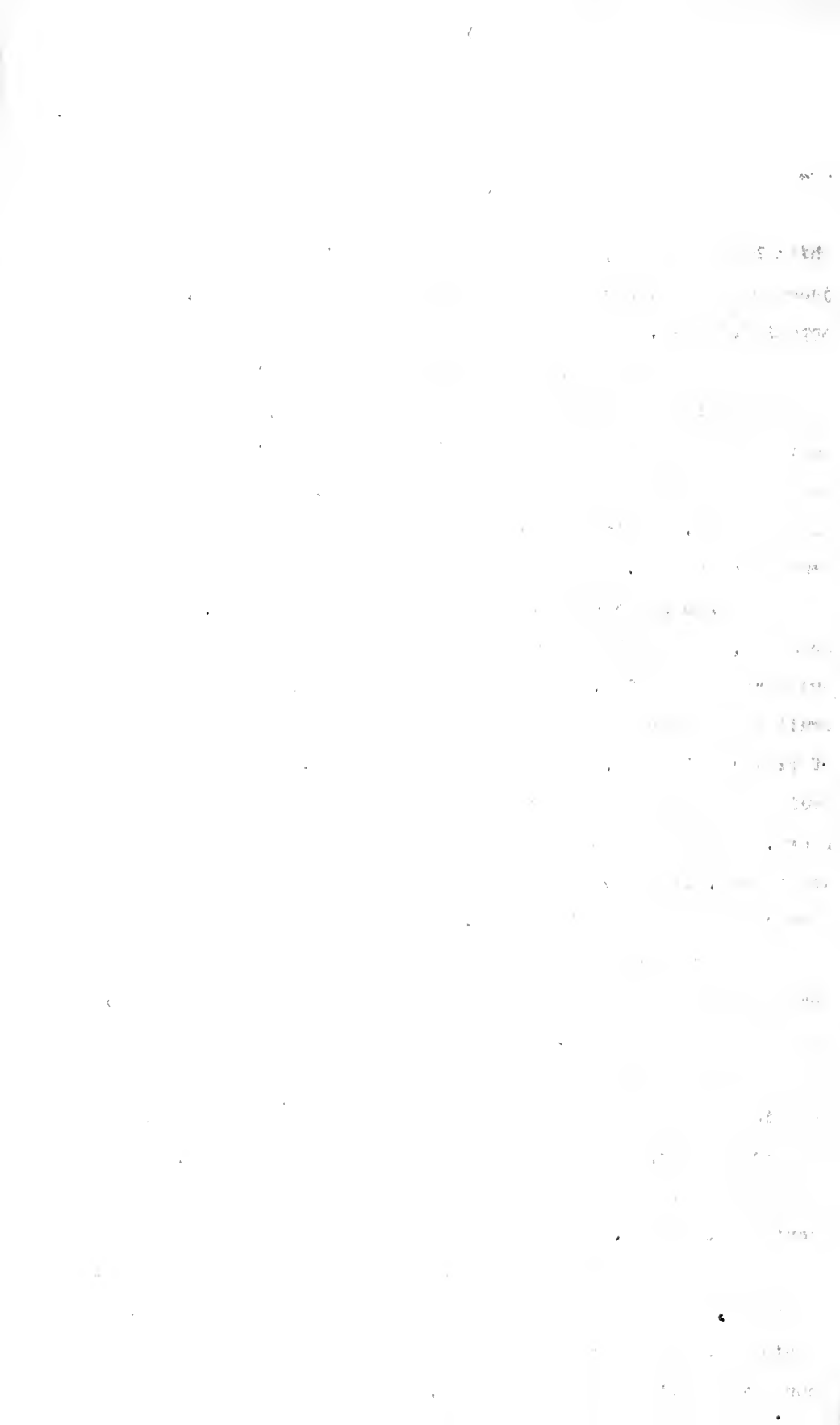
which being entered, motions for a new trial and in arrest of judgment were overruled, and judgment entered for \$1000. This appeal followed.

Appellant argues as reasons for reversal that there was no negligence shown on the part of defendant, and no evidence that the collision caused the injury to plaintiff's hand, further that the verdict shows passion and prejudice, and the judgment is excessive. Plaintiff at the time of the accident was a child four years of age.

The evidence shows that the alley in which the accident occurred, ran north and south, and was about sixteen feet wide, and paved with brick. At the time in question, the one horse fruit wagon stood a little less than two feet from the rear fence of plaintiff's home, which adjoined the alley. The horse and fruit wagon were headed south, and were standing parallel to the fence, the horse being just outside the gate and unhitched and unattended, its driver having gone across the alley to the rear door of a flat on Sheridan road.

The driver of the fruit wagon testified that he heard the noise of the ice cream wagon as it came south in the alley, and stopped to watch it. That as it passed the fruit wagon, the fruit wagon and horse attached to it were standing still; that the hind wheel of the ice cream wagon struck the front wheel of the fruit wagon, and threw the horse up against the gate; that the left shaft of his wagon was broken, and the hub of the left front wheel dented.

This testimony is corroborated by that of one Baldwin, a janitor, who testified that he was going north in the alley, pushing a lawn-mower; that the fruit wagon was standing still, when defendant's wagon ran into it, throwing the horse against

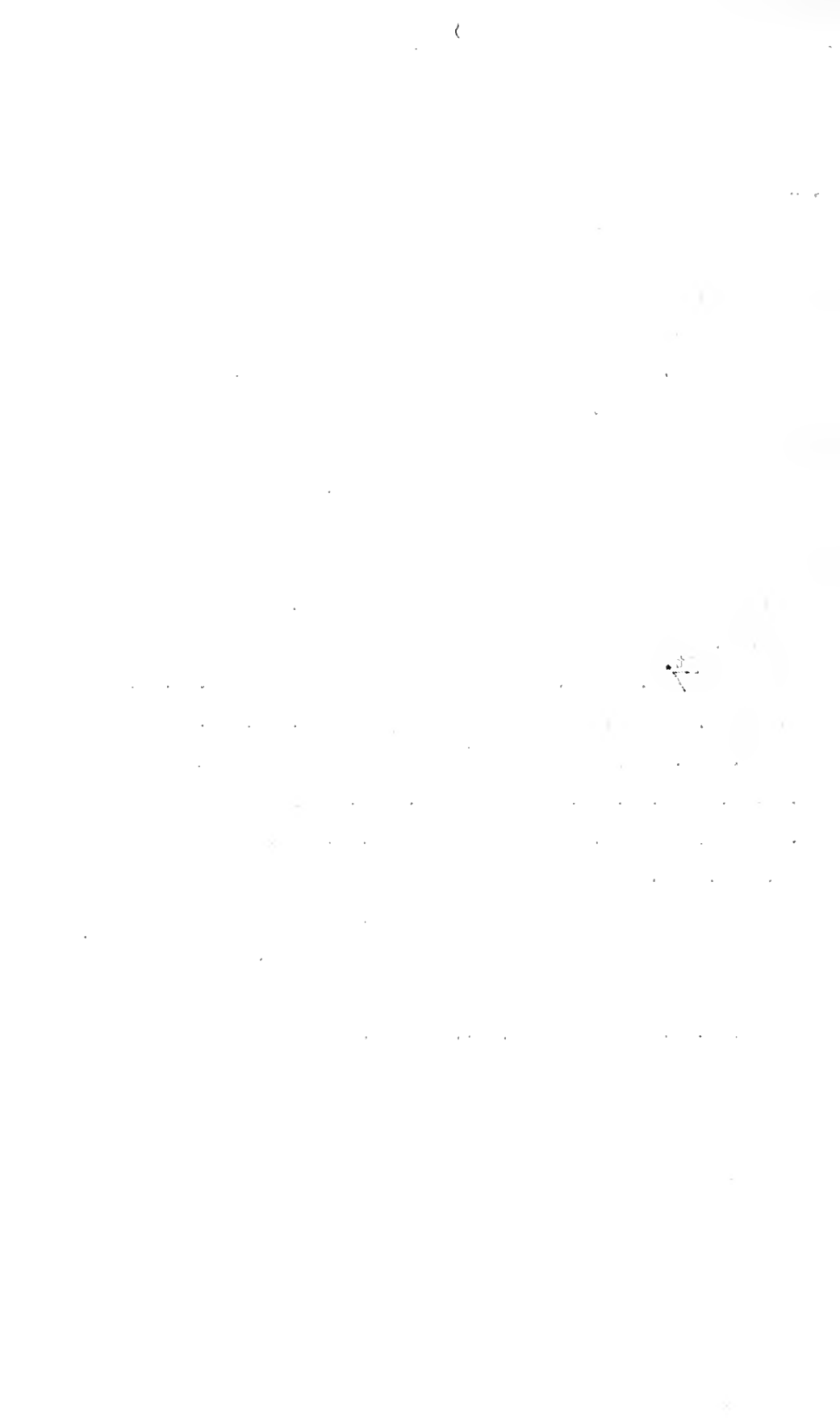


the gate. The grandmother of plaintiff testified that at the time of the accident she was standing right near the kitchen door, facing plaintiff, who was at the gate when the plaintiff screamed, and before the witness could get to her, plaintiff turned around and said, "Grandma, my hand is hurt." That at the time plaintiff screamed she was right at the gate; that her hand was right this way, indicating; that when the witness got down the steps, plaintiff had jerked her hand out; that the plaintiff was all over blood; that the gate-post was stained with blood; and that the witness saw a horse up against the fence.

Contrary to the testimony of this witness, defendant's driver testified that as he was passing the fruit wagon, the horse attached to that wagon slipped into his team, causing a collision; that he knew nothing of the accident to plaintiff until after he got home. That the hub of the front wagon hit the hind wheel of the wagon he was driving. He testified that his eleven year old son was riding with him at the time, but the son was not called as a witness, nor was his absence accounted for.

We think, under the evidence, the jury was amply justified in finding a verdict for the plaintiff.

Nor do we think the judgment is excessive. Plaintiff's attending physician testified that she had a badly lacerated right hand; that he sewed it up as much as possible, and applied a splint; that he took about fifteen stitches; that practically the entire palm was lacerated, and also the tips of the middle and ring fingers; that plaintiff was under his care from August until December; that at the time of the trial the finger was contracted down towards the palm; and that there was evidence of connective tissue growth at its base; that there was a clear two and a half inch scar running across the front of the right index finger down to the palm of the hand; that if one tried to straighten the



187 - 35442

SOLOMON JASMER,

Appellee.

vs.

THE STATE COMMERCIAL AND
SAVINGS BANK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

219 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued for breach of a written contract, whereby defendant employed the plaintiff for one year as manager of its foreign department relating to Russian and Polish trade. The alleged breach was plaintiff's wrongful discharge by defendant prior to the termination of the contract.

The defenses set up by the affidavit of merits were alleged fraudulent representations by plaintiff through which the contract was secured, and alleged breaches of the contract on account of which it is claimed his discharge was not wrongful. The case was tried by a jury, which brought in a verdict for plaintiff in the sum of \$523.56, on which the court entered judgment, motions for a new trial and in arrest of judgment having been overruled.

It is earnestly contended that there was error in the instructions given by the court in writing, but as the abstract of the record fails to show at whose request any one of the instructions was given, we are unable to give this point consideration.

The contract was executed March 1, 1917. By its terms the plaintiff appellee was employed by appellant for one year

as a manager of its foreign department at the sum of \$80 per month for March, April and May, 1917, and \$100 per month thereafter, payable on the 15th and last days of each month, and in addition, plaintiff was to receive a commission of 15% of the net profits realized from Russian and Polish trade. Plaintiff agreed to devote his entire time and efforts to such department, to and use every effort in the promotion and successful conduct of the same. He was discharged on June 19, 1917. Prior thereto on June 11th, he brought suit against appellant for sum claimed to be due on salary, and the sum claimed was thereafter paid.

The president and cashier of the Bank testified that they repeatedly took Jesmer to task for his absence from the Bank, and while Jesmer on rebuttal, denied this was true, he did not deny the testimony of the cashier to the effect that when he, the cashier, told him he would have to make out a report stating what people he had seen, he replied that he didn't have to do that, that it was not called for in the contract.

The president, cashier and other employees of the Bank gave evidence tending to show that Jesmer absented himself from his work, and neglected it to a great extent. The court, over the objection of the defendant, admitted in evidence the files in the prior suit between the same parties, which suit had been settled. These files included the statement of claim, summons and record sheet, and the statement of claim was read in evidence to the jury, and a motion by defendant to strike out the same, was denied by the court. We are not able to understand on what theory this evidence was admitted or allowed to stand. Irrespective of other errors alleged, we think the error assigned, that the court admitted improper evidence on behalf of appellee, must be sustained. The judgment will be reversed and the cause remanded.
arnes, P. J., and Gridley, J., concur. REVERSED AND REMANDED.

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SOLOMON JEWETT,

Appellee,

vs.

THE STATE COMMERCIAL AND
SAVINGS BANK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

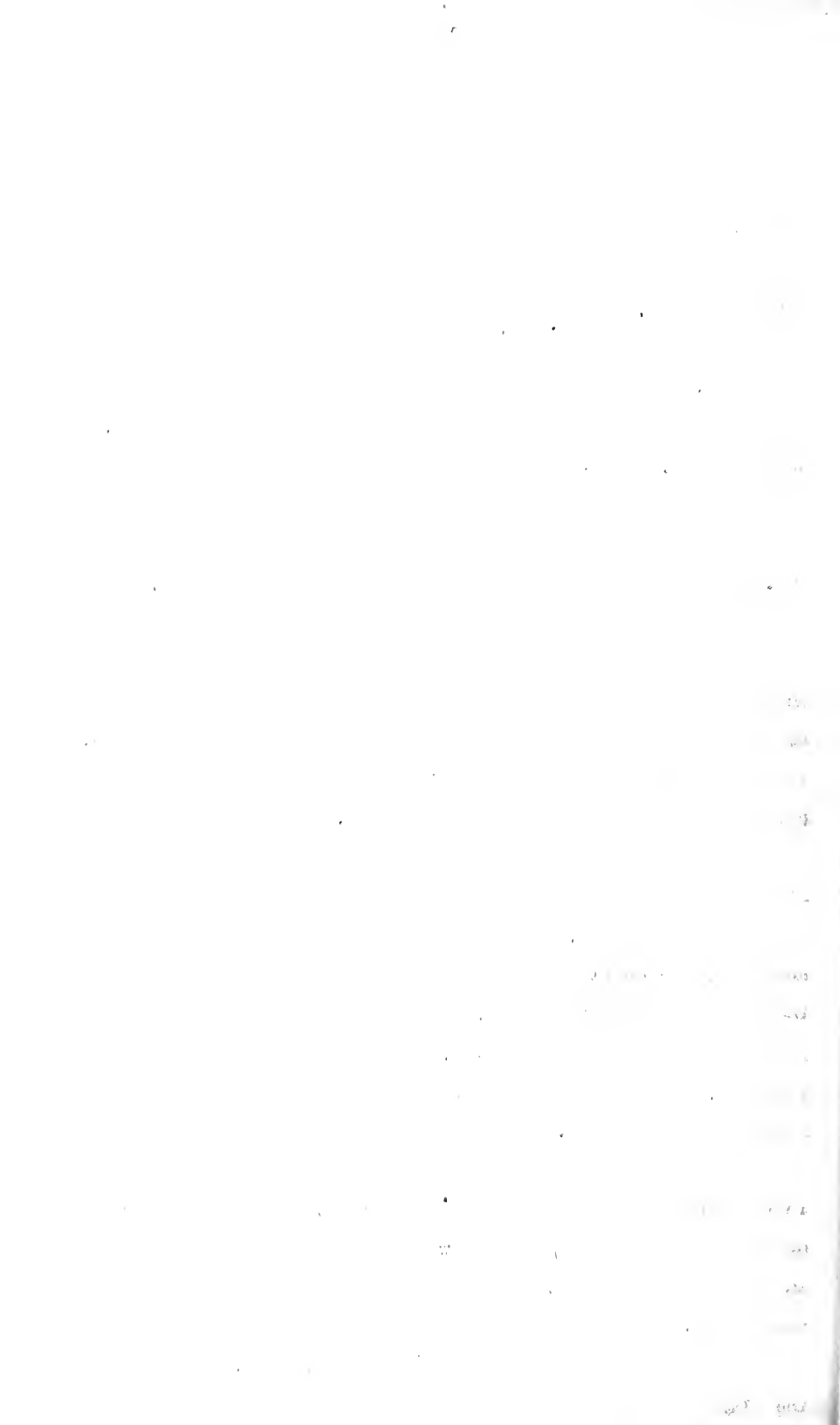
MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued for breach of a written contract, whereby defendant employed the plaintiff for one year as manager of its foreign department relating to Russian and Polish trade. The alleged breach was plaintiff's wrongful discharge by defendant prior to the termination of the contract.

The defenses set up by the affidavit of merits were alleged fraudulent representations by plaintiff through which the contract was secured, and alleged breaches of the contract on account of which it is claimed his discharge was not wrongful. The case was tried by a jury, which brought in a verdict for plaintiff in the sum of \$523.56, on which the court entered judgment, motions for a new trial and in arrest of judgment having been overruled.

It is earnestly contended that there was error in the instructions given by the court in writing, but as the abstract of the record fails to show at whose request any one of the instructions was given, we are unable to give this point consideration.

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as a manager of its foreign department at the sum of \$80 per month for March, April and May, 1917, and \$100 per month thereafter, payable on the 15th and last days of each month, and in addition, plaintiff was to receive a commission of 15% of the net profits realized from Russian and Polish trade. Plaintiff agreed to devote his entire time and efforts to such department, to and use every effort in the promotion and successful conduct of the same. He was discharged on June 19, 1917. Prior thereto on June 11th, he brought suit against appellant for sum claimed to be due on salary, and the sum claimed was thereafter paid.

The president and cashier of the Bank testified that they repeatedly took Jenner to task for his absence from the Bank, and while Jenner on rebuttal, denied this was true, he did not deny the testimony of the cashier to the effect that when he, the cashier, told him he would have to make out a report stating what people he had seen, he replied that he didn't have to do that, that it was not called for in the contract.

The president, cashier and other employees of the Bank gave evidence tending to show that Jenner absented himself from his work, and neglected it to a great extent. The court, over the objection of the defendant, admitted in evidence the files in the prior suit between the same parties, which suit had been settled. These files included the statement of claim, summons and record sheet, and the statement of claim was read in evidence to the jury, and a motion by defendant to strike out the same, was denied by the court. We are not able to understand on what theory this evidence was admitted or allowed to stand. Irrespective of other errors alleged, we think the error assigned, that the court admitted improper evidence on behalf of appellee, must be sustained. The judgment will be reversed and the cause remanded. Barnes, P.J., and Gridley, J., concur. REVERSED AND REMANDED.

201

201

247 - 25504

M. E. OLD,
Appellee,

vs.

S. I. KAUFMAN, trading
as Kaufman & Company,
Appellant.

Appeal from

Municipal Court

of Chicago.

219 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below, who is appellee here, sued as the assignee of the Flour City Ornamental Iron Company in his statement of claim, alleging that certain goods had been sold and delivered by the Iron Company at the price of \$1230, on which \$500 had been paid, and asking judgment for the balance.

Defendant filed his affidavit of merits in which he alleged he had a good defense to the whole of plaintiff's demand, but further, that plaintiff could not maintain his action because the Flour City Ornamental Iron Company was at the time of the purported assignment of its claim to the plaintiff, a foreign corporation, doing business within Illinois, without being licensed so to do; that the contract between the said Iron Company and defendant was void and unenforceable.

The plaintiff having filed an additional affidavit setting up that he acquired title to the account on January 18, 1917, by assignment in writing, the defendant filed an amended affidavit of merits, in which, in addition to the facts alleged in the original affidavit, he further alleged:

"that the transaction, which is the basis of this cause was not inter-state commerce, but was business transacted within the State of Illinois, and that from July 23rd, 1914 to January 9th, 1915, the Flour City Ornamental Iron Company was doing business within Illinois, which business was not inter-state commerce or commerce between States of the United States."

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The cause was tried by the court without a jury. It was stipulated that plaintiff's assignor, was, at the time of the contract in question, a corporation organized, existing and doing business under the laws of Minnesota, and had not filed its articles of incorporation, and was not licensed to do business in Illinois, and that any defense that would have been available against the Flour City Ornamental Iron Works, the original owner of the claim sued on, would be available against the plaintiff.

The evidence showed that the goods and merchandise for the price of which suit was brought, were contracted for by defendant in Chicago, July 24, 1914; that the subject matter thereof was sixteen bronze gates of a certain design, which were to be furnished F. Q. B. Chicago, at the price of \$75 each. The evidence, we think, conclusively established, that the contract was made in Chicago, Illinois, and that as alleged in the affidavit of merits, the Flour City Ornamental Iron Company from July 23, 1914, to January 9, 1915, was doing business within the State of Illinois.

The trial court found as facts that said Iron Company was a foreign corporation, organized under the laws of the State of Minnesota, for the transaction of business for profit; that it was not authorized or licensed to do business in the State of Illinois; that it had not been admitted into the State of Illinois for the purpose of transacting business or exercising its corporate powers or franchises; that the secretary of the State of Illinois had not issued a certified copy of the charter of said corporation or a certificate of authority for said corporation to do business in this state.

But the trial court refused to hold facts, as requested, by defendant, that the contract in question was made and executed in the State of Illinois; that it was to be performed in the

State of Illinois; that it was not interstate commerce; that the matters and things done under said contract were not interstate commerce, and made a finding for the plaintiff, and entered judgment for the amount claimed.

If the transaction was one in inter-state commerce, the finding and judgment of the court was correct. Art Works v. Picture Frame Works, 264 Ill. 610. If the contract here sued on in its provisions contemplated the manufacture without the State of the goods contracted for, and the shipment of the goods from the State of Minnesota into the State of Illinois, then the transaction must be held to have been one in inter-state commerce. International Textbook Co. v. Pigg, 217 U. S. 91; Liquor Remedy Co. v. Cope, 235 U. S. 198; U. S. Fashion & Sample Book Co. v. Schmidt, 309 Ill. App. 240.

To think the burden of establishing the affirmative defense set up by the affidavit of merits, as amended, was on the defendant, and that the court was therefore justified in finding that the allegation of the affidavit that the transaction was not in inter-state commerce, had not been established. Delta Bag Co. v. Kearns, 160 Ill. App. 93.

No evidence of any other defense was offered and the judgment will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.



104 - 25357

WM. J. CROOK,

Plaintiff in Error.

v.

MARK LEVY AND ARTHUR G. LEVY,
co-partners trading as MARK
LEVY AND BROTHERS and SARATOGA
EUROPEAN HOTEL AND RESTAURANT
COMPANY, a corporation,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

219 L.A. 653

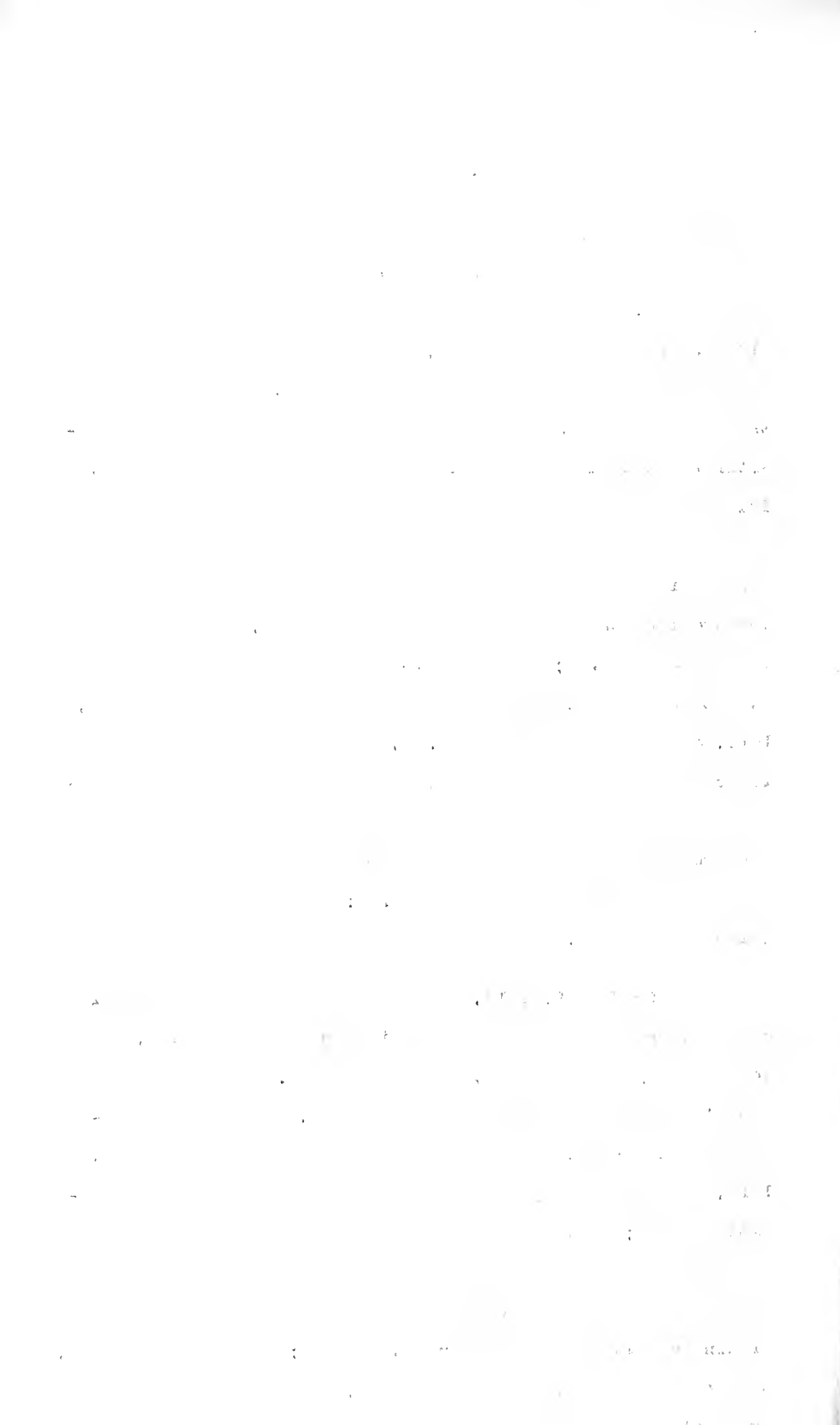
MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On May 23, 1916, the plaintiff brought suit
against the defendants for the return of the sum of \$833.33
which it was claimed by him he had paid as the first month's
rent for certain premises. The cause was tried without a
jury and on July 19, 1916, judgment was entered finding
the issues against the plaintiff.

In his statement of claim the plaintiff set up
that on April 12, 1915, he paid to the defendants, Mark
Levy Brothers, \$833.33 to apply as the first months rent
for a certain store, being the ground floor of No. 17
South Dearborn street, which was to be used by him as a
moving picture theatre; that at the time he was not advised
that it would be unlawful under the city ordinances to con-
duct a moving picture theatre upon these premises; that
the defendants did know of that fact; that he paid the
money relying upon the right to use and enjoy the premises
for a moving picture theatre; that at the time of the pay-

ment of the money the Saratoga European Hotel and Restaurant Company occupied the premises above the first floor of the store at No. 17 South Dearborn Street as and for a hotel with sleeping rooms and apartments; that it was provided in an ordinance of the City of Chicago (Class 4c, Sec. 330 to 332) that "No room or hall used for the purposes of Class 4c hereafter be installed underneath any living or sleeping rooms." That the defendants knowing that a moving picture theatre was unlawful in that place and knowing a lease thereafter of the premises would be illegal, the plaintiff, relying upon the promises and assurances of the defendant, paid to them the sum of \$833.33; that the plaintiff subsequent to the execution and delivery to him by the defendants on April 12, 1915, of the receipt for \$833.33, and before an actual lease was executed and delivered to them notified the defendants that the use of the premises for a moving picture theatre was prohibited by the city ordinances and demanded that the defendants return to him the \$833.33; that the demand was not complied with.

On June 9, 1916, the defendants filed an affidavit of merits stating that the plaintiff on April 12, 1915, paid to Mark Levy and Brothers, the sum of \$833.33 for the first month's rent of the premises in question, and that the proposition to lease, as set forth in the receipt of April 12, 1915, was accepted by the Saratoga European Hotel and Restaurant Company; that at the time of the entry into the lease that company occupied the floors and premises of the building above the ground floor and conducted therein a hotel consisting of living and sleeping apartments; that the plaintiff, before he entered into the agreement, was fully informed and expressly advised by Mark Levy, one of the defendants, on be-



half of the Saratoga European Hotel and Restaurant Co., that there was an ordinance prohibiting moving picture halls underneath living or sleeping rooms; and that the room known as 17 North Dearborn street was under living and sleeping quarters; that the plaintiff informed Mark Levy that he had knowledge of those facts, both of the ordinance and the condition of the premises, and stated that his architect and contractor could so arrange the property that a license or permit could be obtained; that the plaintiff being fully advised as to the matters set forth persuaded and induced said defendants to enter into this lease; that said defendants relying on the ability of the plaintiff to carry out his plans so as to render said premises capable of being used for the purpose intended in a lawful and legal manner entered into said lease; that by reason thereof the defendants were prevented from securing and obtaining other tenants until after the expiration of a portion of the first month of the lease and by reason of the failure of the plaintiff to deposit the sum of \$10,000.00 as provided for in said lease on or before April 22, 1915, the said sum of \$833.33 was forfeited to the defendants as credited in liquidated damages for a failure of the plaintiff to perform said agreement on his part.

Three witnesses were called: Wm. J. Crook, plaintiff, Margaret Jacobs and Daniel E. Mulvey. There was offered in evidence the receipt which was given to the plaintiff by the defendants, Mark Levy and Brothers, which is as follows:

"Received of William J. Crook, check for \$833.33 on the Kenwood Trust & Savings Bank, payable to our order, to apply as the first months rent of the term as provided for in the lease, which I have signed of even date herewith for the store known as No. 15 S. Dearborn Street, to be used as a Moving Picture Theater,

to be refunded if the proposition is rejected by the Saratoga European Hotel & Restaurant Company, or my references are not found satisfactory.

It is expressly agreed that in the event said lease is accepted by the owners and I fail to deposit the sum of \$10,000.00, as provided for in said lease, on or before April 22nd, 1915, that said sum of \$833.33 shall be forfeited to us as agreed and liquidated damages (and not as a penalty) for my failure to perform said agreement on my part, thereby waiving all claims of every kind and nature against us, the lessors and the premises."

There was also offered a copy of the lease dated April 12, 1915, and signed Saratoga European Hotel & Rest. Co., M. Sebree, Pres. Wm. J. Crooks.

The lease provided for a term beginning May 1, 1915, and ending October 30, 1925, for a total rental of \$_____, payable in installments of \$833.33 on the first day of each month, said premises to be used as a moving picture theatre and for no other use and purpose. There was also offered in evidence a "rider" to the lease which provided, among other things, that the lessee before April 22, 1915, and prior to the making of any contract for the remodeling of the premises make a deposit with some responsible bank in Chicago satisfactory to the lessors for the sum of \$10,000.00; that that sum of \$10,000.00 shall be held, applied and disposed of by said bank holding said deposit as follows:

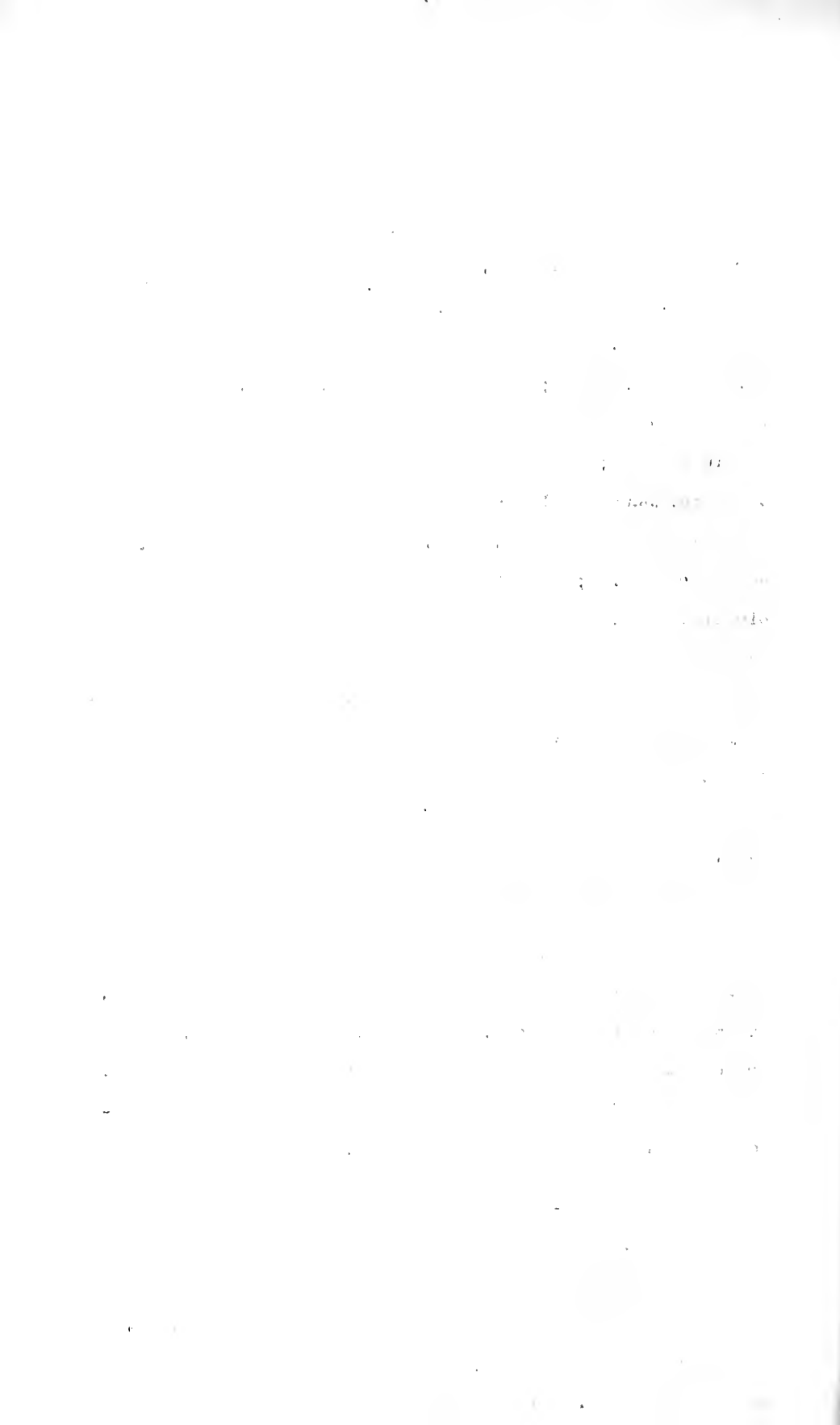
"Until the lessee shall furnish lessors with building set of plans and specifications for the remodeling of said premises which shall have the stamp and approval of the various departments in the City of Chicago covered by the various ordinances covering such remodeling and improvements."

It is further provided in the "rider" that said lessee will at his own expense comply with all ordinances in making all said alterations, changes or improvements.

It is the evidence of the plaintiff that he saw Mark Levy April 12, 1915, in reference to an advertisement that appeared in the Tribune; that he spoke to him in regard to renting No. 17 South Dearborn street and using it for a moving picture show; that Levy said he, Crook, would have to see Miss Jacobs who was secretary and manager of the Saratoga Hotel; that he subsequently saw Miss Jacobs; that the memorandum and lease which were offered in evidence were signed on April 12, 1915, and that on the same day he paid the \$833.33; that before he signed the lease Levy told him that a Mr. Mulvey had been to see Miss Jacobs and informed her that a permit for the theatre could be gotten and that the place could be used as a theatre. There is some testimony for the plaintiff in regard to being informed by Levy that the lease in question which was signed Levy did not accept and that the defendants had a new lease for him to sign, but as no such lease is in evidence the subject is immaterial and irrelevant.

The plaintiff further testified that two or three days after the lease was signed he ascertained from Kelly, an inspector of theatres, and Olson, his assistant, that he could get no license to conduct a theatre on the premises. He also testified that he did not know that 17 South Dearborn street was under hotel premises.

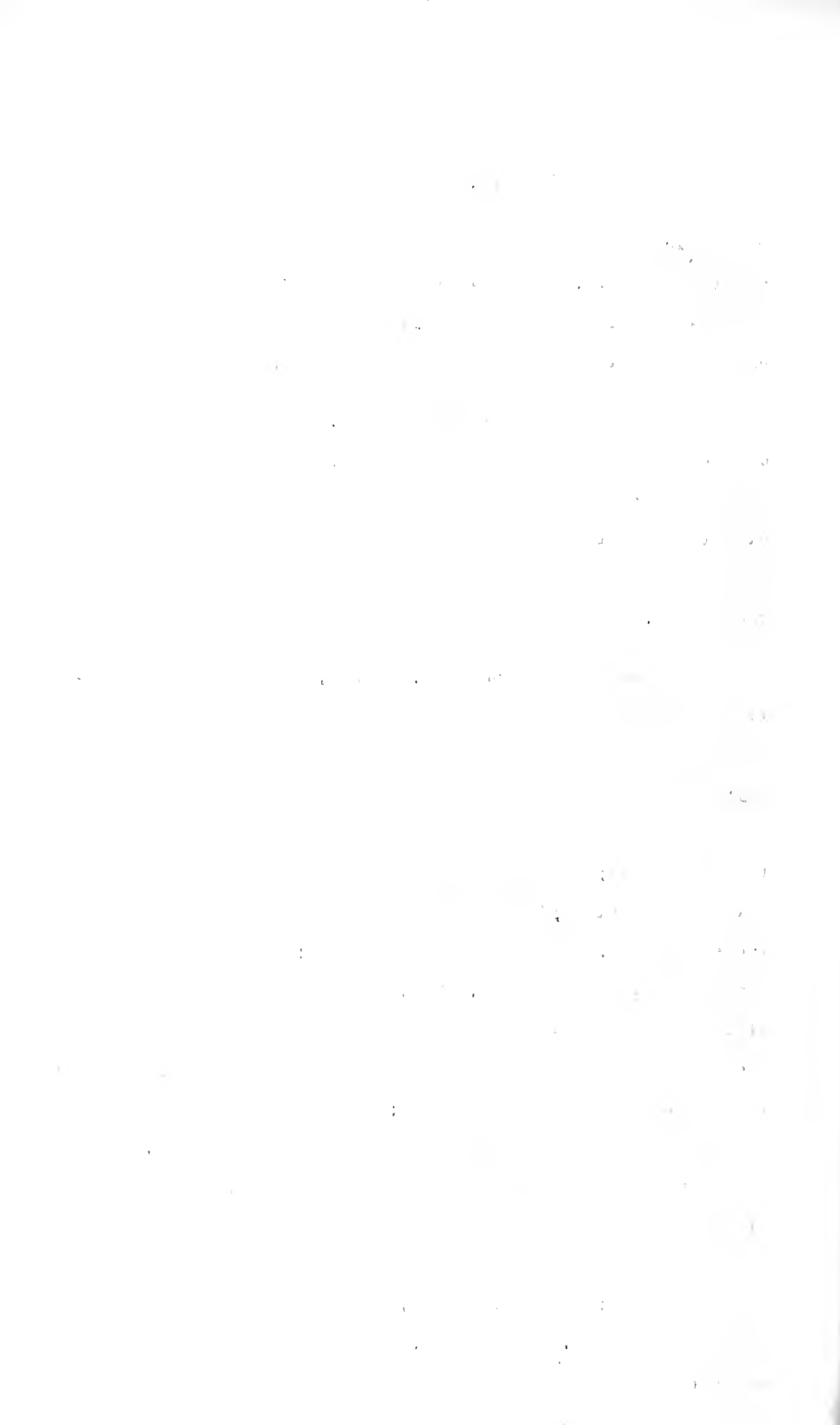
On cross-examination the plaintiff testified that he asked Mulvey if the premises could be used for a theatre and what it would cost to reconstruct and equip it; that Mulvey looked it over and told him it would cost \$10,000.00 to equip it for a theatre; that he was never told before he paid the \$833.33 that a moving picture theatre could not



be conducted on the premises because there were sleeping apartments above. On redirect examination the plaintiff testified that Mulvey investigated the building for him and reported that a permit could be gotten.

The witness Margaret Jacobs, Treasurer and Manager of the Saratoga Hotel & Restaurant Co. testified that she was familiar with the premises known as 17 South Dearborn street and that there are sleeping and living rooms over said premises which are under the management of the Saratoga Hotel.

The witness Daniel E. Mulvey, called by the plaintiff testified that prior to the time that the plaintiff told him he had the deal closed up and had ten or twelve days option on the place he went over to the Saratoga Hotel and found there were living and sleeping quarters right above the store room; that on each occasion that he had a session with the plaintiff, ^{there was} a talk about the sleeping or living rooms above No. 17 South Dearborn street; that some time about the middle of March, 1915, the plaintiff visited his office and asked him if a certain building on Dearborn street known as the Saratoga Hotel could be remodeled into a theatre; that he told him he did not know; that he then discussed with the plaintiff how much money he intended to put in it, the amount of work the investigation would require; that the plaintiff told him he was sincere and that the whole thing depended upon whether or not the building could be remodeled into a theatre; that he, Mulvey, then went to the hotel and asked Miss Jacobs, the manager, if she would lease it and whether the plaintiff had called to see about it; that she said she had heard of it and that if it could be remodeled



in accordance with the law for a theatre she would rent it; that she asked him whether or not it could be done; that he then had another conference with the plaintiff and told him that he had seen Miss Jacobs and that she said she would rent it for a theatre and that he would report to him in two or three days; that he sent an engineer who went through the entire building and in two or three days when the plaintiff called again he, the witness, told him it would cost from \$10,000.00 to \$15,000.00 and that the plaintiff said that would be all right that he was ready and willing and able to enter into the contract "if it is possible for it to be built"; that he, Mulvey, went to the building department again and requested the building commissioner or the chief theatre inspector to go over and examine the building with him; that that was done and he was advised that it could be remodeled and upon their recommendation he so reported to the plaintiff and prepared to arrange for a preliminary plan; that the plaintiff then told him "you see I am only promoting this enterprise I haven't the money myself"; that he then learned for the first time that the plaintiff was unable financially to carry out the project; that the plaintiff said he had a party who was able to furnish \$12,000.00 and that now that he knew the conditions he would get to work on it and see him, Mulvey, in a day or two; that the plaintiff came back about two days later and said, "I have closed the lease. I have got the situation tied up." That he also said "I had to do that to protect myself. I have only \$2,000.00 capital to put into this proposition and I expect to get a half interest in this proposition"; that he said that he had it tied up under a ten or twelve day

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option. Mulvey further testified that the whole matter fell through and that the plaintiff told him that the man he had in mind had fallen down on his premises so that he was sorry he had given him, Mulvey, the trouble and wished to know if Mulvey knew of anybody else; that he, Mulvey, referred him to a number of parties who were in the market for such things; that every time he had a session with the plaintiff from the first time he met him the one vital point they talked about was the sleeping and living rooms over the store room at No. 17 South Dearborn street.

At the close of the evidence the following colloquy occurred:

"MR. GILMORE: Will your Honor give me an opportunity to support my position, I ask for a continuance.

THE COURT: I can only go by the evidence; just by what has been disclosed by the evidence.

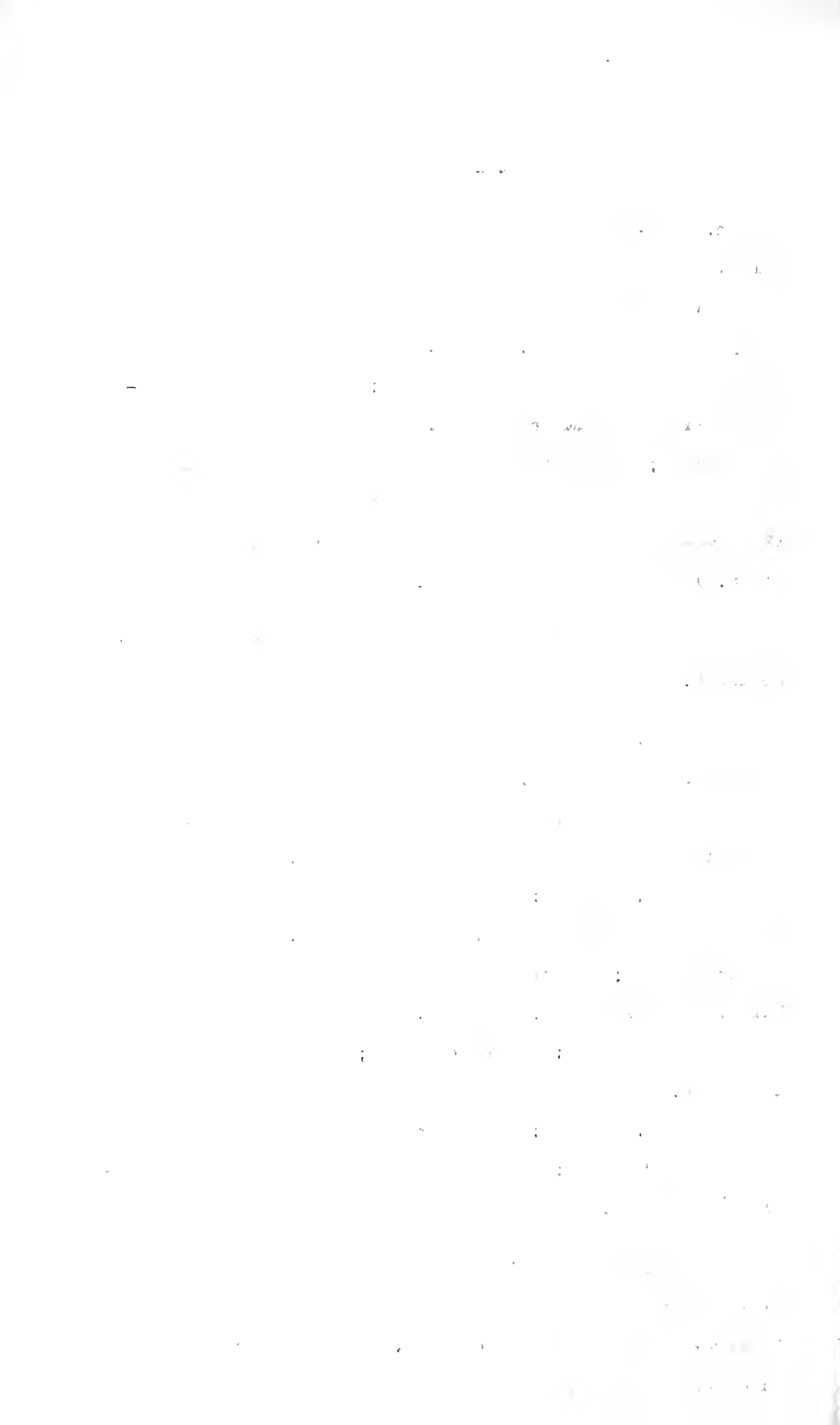
MR. GILMORE: Before your Honor has rendered a decision I want to be permitted to call Mr. Erickson as a witness here; I want to be permitted to call in the building commissioner, Erickson.

THE COURT: He is not here; and I cannot continue this case.

MR. GILMORE: I was taken by surprise.

THE COURT: Surprise or no surprise I cannot continue this case."

The plaintiff's cause of action as set forth in the statement of claim is based on the theory that he was entitled to recover back a deposit of \$833.33 because the defendants induced him to pay over that sum under an agreement the object



of which was prohibited by law. Such was the claim when the cause was tried in the lower court.

The testimony of Mulvey, the plaintiff's witness, shows conclusively that the plaintiff knew that the premises in question were under living and sleeping quarters and that the defendant, Mark Levy, did not conceal that fact from him. Mulvey testified that every time he had a session with the plaintiff the principal thing they talked about was the sleeping or living rooms over the store room. It is obvious, therefore, that the plaintiff's case, as made out upon the trial, entirely disproved the theory of illegality as set forth in the statement of claim. In this court the plaintiff now advances for the first time the claim that he is entitled to recover because the defendants repudiated and rejected the proposed lease. The evidence, however, does not support even that contention.

From what the record contains, it is our opinion that the plaintiff paid the deposit of \$833.33 believing that he would be able to go on and carry out the agreement which he made at the time of the payment, but that subsequently he found that he was unable to do so, and then sought without good reason to recover back his money.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

130 - 25384

BENJAMIN SCHWARTZ,

Appellee.

v.

ELIAS FISCHHEIMER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2191.A. 654

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On April 16, 1915, the plaintiff demised, by written lease, 604 North Clark street, Chicago, to the defendant, until April 30, 1920, for a rental of \$4800.00, to be paid in monthly installments of \$80.00.

Sometime about May 15, 1918, the defendant endeavored to obtain a cancellation of that lease and the creation in its stead of a fourteen year lease at a rental of \$75.00 a month. Accordingly a fourteen year lease was drawn up, and was signed by the defendant on August 1, 1918, and at that time delivered to the plaintiff.

It is claimed by the defendant that at the time of the negotiation for the fourteen year lease, his rent had been paid up to July 1, 1918, and that the plaintiff agreed in consideration of the change in the leasing to allow him credit for the rent for the month of July, 1918. On August 1, 1918, the defendant paid the rent for that month, by a check for \$73.00 and a credit for repairs of \$2.00. That was at the rate specified in the new lease. On September 6, 1918, the

defendant paid the rent for that month by check for \$75.00 and on October 21, 1918, he was credited with \$75.00 for the rent of that month.

It is agreed by counsel for both parties that the fourteen year lease is not in force; and, also, it is admitted by the defendant through counsel that he owed rent at the rate of \$80.00 per month for the months of November and December, 1918, and January, 1919, under the old lease. The result is that the claim of the plaintiff at the trial was for four months' rent at \$80.00 per month, and a balance of \$5.00 for each of the months of August, September and October, 1918, making in all, together with \$50.00 attorney's fees, the sum of \$335.00, the amount for which judgment was finally entered and from which this appeal has been taken.

The defendant now contends that, as a matter of law, the rent for the month of July was released and discharged by the mutual acts and agreements of the parties. But that contention, in view of the evidence and the admissions of the defendant, is now untenable. And the same is true as to the contention that the defendant did now owe a balance of \$5.00 for each of the months of August, September and October, 1918. At no time was the fourteen year lease in force. Having admitted that the defendant owed three months rent at \$80.00 for the months of November, and December, 1918, and January, 1919, it may not now be reasonably claimed by the defendant that his rent was not \$80.00 but \$75.00 per month during August, September and October, 1918.

As to the contention that it was erroneous to allow \$50.00 attorney's fees:- That matter is now put forward for

the first time. The original judgment by confession was for \$370.00, and on February 28, 1919, after a jury trial and verdict, during which time the original judgment stood as security, a judgment for \$385.00 was entered. On March 8, 1919, apparently to rectify the record and make the proceedings regular, the original judgment by confession and the judgment of February 28, 1919, were both vacated, and a final judgment in the sum of \$385.00 was then entered.

At the trial evidence was introduced to the effect that a fair and reasonable charge for legal services rendered in confessing the judgment, was \$50.00. Under the circumstances, the lease providing for attorney's fees, the judgment by confession having been entered and subsequently vacated, evidence having been introduced without objection that the attorney's fees were worth \$50.00, and finally, the judgment by confession being vacated to permit the re-entry of a final judgment, which differed only in a very small amount from the original judgment by confession, we are of the opinion that no error was committed in allowing attorney's fees.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

151 - 25405

GEORGE W. WARHURST,

Appellee,

v.

THE J. F. ROWLEY COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

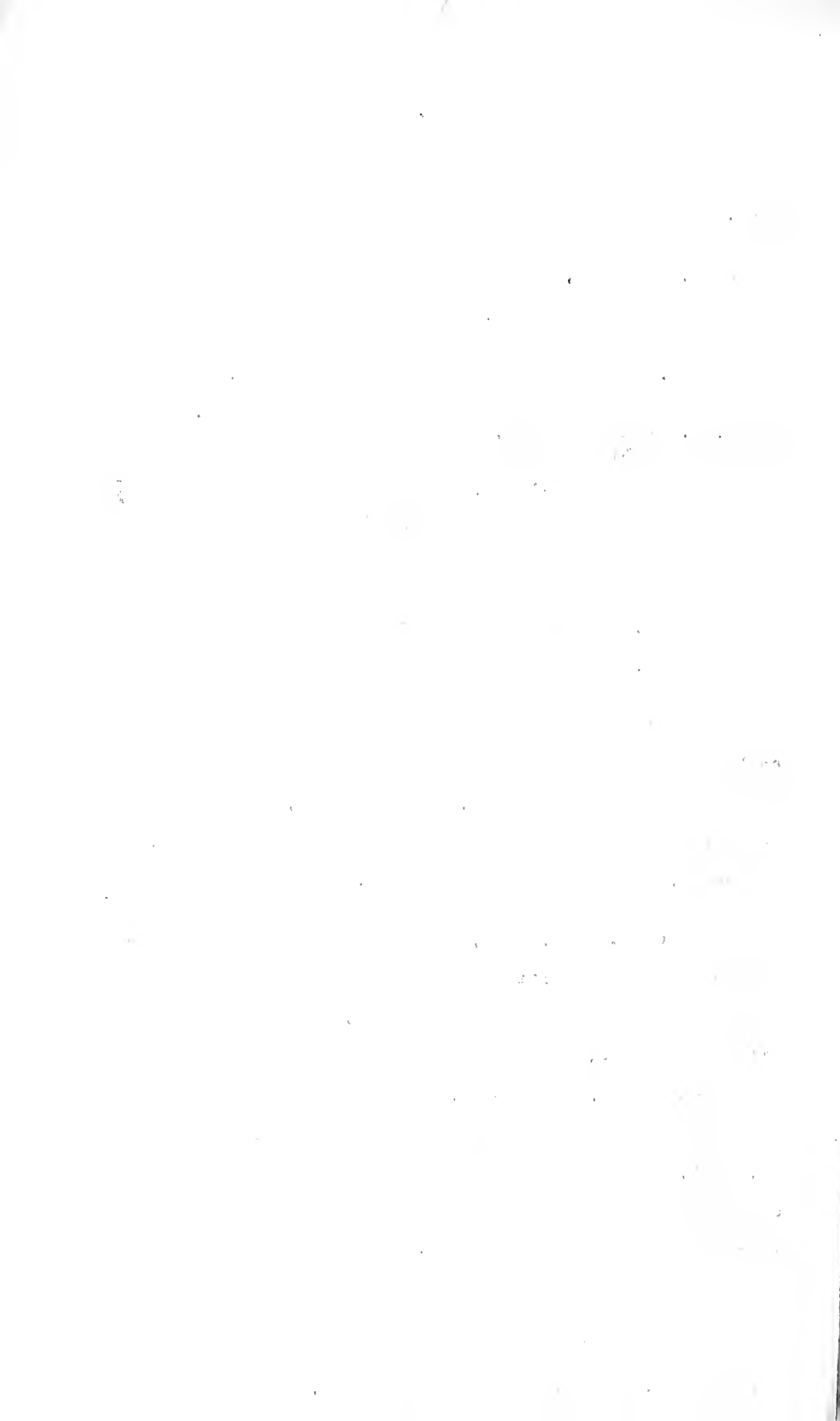
219 L.A. 654

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Claiming that he had a three year contract of employment and that the defendant discharged him before the expiration of that time, without cause, the plaintiff brought suit and recovered judgment in the sum of \$400.00 and costs. This appeal is therefrom.

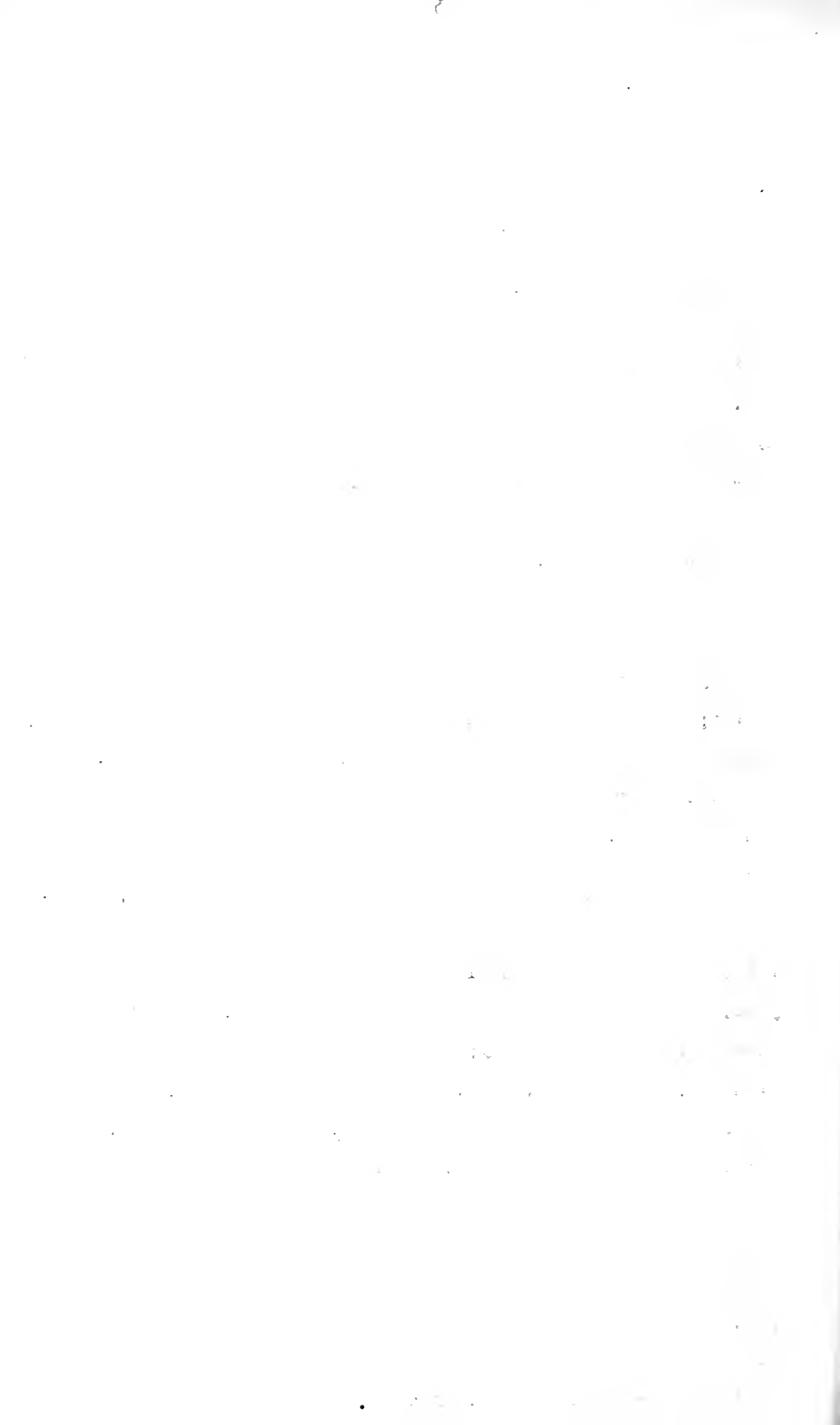
On July 12, 1913, the plaintiff and the defendant entered into a written agreement whereby the plaintiff was employed by the defendant company, a manufacturer of artificial limbs, for three years from that date as a machinist at \$25.00 per week. The plaintiff began to work under the aforesaid contract on July 15, 1913. On October 30, 1914, he was notified, in writing, by the defendant that owing to an emergency the board of directors had decided to make a cut of 10% on all salaries and commissions from and after the first day of December, 1914.

It is the evidence of the plaintiff that upon receipt of that notice he went to Rowley, the president of the company, and had a conversation with him concerning



the proposed reduction. He also had a conversation with Murphy and Tresch, who were sent by Rowley to see if they could not settle the matter with him. The plaintiff says that the day after receiving notice Murphy handed to him his check and asked him what he was going to do; if he was going to accept the cut, and that he, the plaintiff, answered that he was not; that Murphy then said, "Its all off if you don't accept the cut."; that on Monday morning he reported to work and was told by Tresch that he could go to work if he accepted the cut but not otherwise; that he reported on Tuesday and Wednesday of the same week and received the same answer; that he then sought and obtained work elsewhere, and during the life of his contract from that work earned \$872.81. The plaintiff's work was making steel legs for amputations, and shoe parts.

Rowley, the president of the defendant company, testified that the plaintiff, after he came to work in July, 1913, worked steadily until November or December of that year, when he was absent for two or three weeks, without authority from the company; that during that time he was drinking; that in May, 1914, the same thing happened; that he did not have any talk with the plaintiff on October 31, 1914, but that on November 6, 1914, he sent for him and in speaking of the contract of employment said to the plaintiff "When a notice was issued to the employees concerning a cut in salaries and commissions we did not contemplate you, we suppose you had horse sense enough to know we would not issue a notice to all of the employees and put you in an exception in the notice. I have received information



from the shop and I have watched there myself and you have endeavored to array the employees against the company when your time and best endeavor is a portion of your contract and I understand you are endeavoring to shape up among the stock holding employees a fund with which to hire a lawyer to put the company out of business. You are not working for the company. A check awaits you from the manager." The evidence shows that although it was claimed by Rowley that the plaintiff was away two or three weeks in December, 1913, and away in May, 1914, he went to work afterwards the same as usual.

On cross-examination Rowley testified that the plaintiff was called to the office on account of his general conduct; that the cutting of plaintiff's wages had nothing to do with his discharge; that he was discharged because of his "agitation"; putting employees against the company; always talking against the company.

A witness Schroeder testified that the week after the plaintiff quit work he told the witness that he was going to put the company out of business; that at the time the plaintiff said that, there were three or four other employees present; that the plaintiff said that they could all put up some money for attorney's fees and then make the company pay them dividends.

A witness, Boyle, a former employee who worked with the plaintiff at the time the latter was employed by the defendant, testified that the plaintiff left the defendant about October 30 or 31, 1914; that he saw him the week following; that the plaintiff talked to him about conditions and



cut in wages; that the plaintiff said the workmen should not stand for anything like that; that he had various talks with the plaintiff; that the latter said on one occasion he wished to get the boys together to put the company out of business so they could appoint a receiver.

On cross-examination the witness testified that he told the president of the defendant company that the plaintiff was trying to get a receiver appointed; that the plaintiff, after he was discharged, told him that he had a contract for \$25.00 a week and was going to make them live up to it.

A witness, Prince, also testified that he knew of two occasions when the plaintiff was off work for several weeks.

The plaintiff testified in rebuttal and contradicted the testimony of Rowley, denying that the latter sent for him to go to his office or said that he had been going around the factory getting funds to hire a lawyer and denying getting drunk. At the close of the evidence three instructions were given for the plaintiff and six for the defendant. The jury brought in a verdict against the defendant for \$400.00 and judgment was entered on that amount.

The defendant contends that the plaintiff failed to comply with the contract of employment; that he did not give his time and best endeavor to the interest of the defendant nor comply at all times with the directions and instructions of the defendant and deport himself as befitting his position. What evidence there was on that subject, that is, as to what the plaintiff did and whether he conducted himself as an ex-

ployee should, was submitted to the jury under proper instructions and unless we are able to conclude that that evidence clearly and manifestly does not support the verdict we are not entitled to override it.

The president of the defendant company testified that on November 6, after a conversation with the plaintiff the latter was discharged, and a careful consideration of the circumstances, even as recited by the president of the company in his testimony, suggests very strongly that the real reason for the discharge of the plaintiff was not dereliction on the part of the latter but a desire on the part of the company to cut down expenses. If the jury believed the testimony of the plaintiff, and it may easily have done so, the defense set up by the company failed. We have carefully considered all the evidence in the case and feel bound to let the judgment stand.

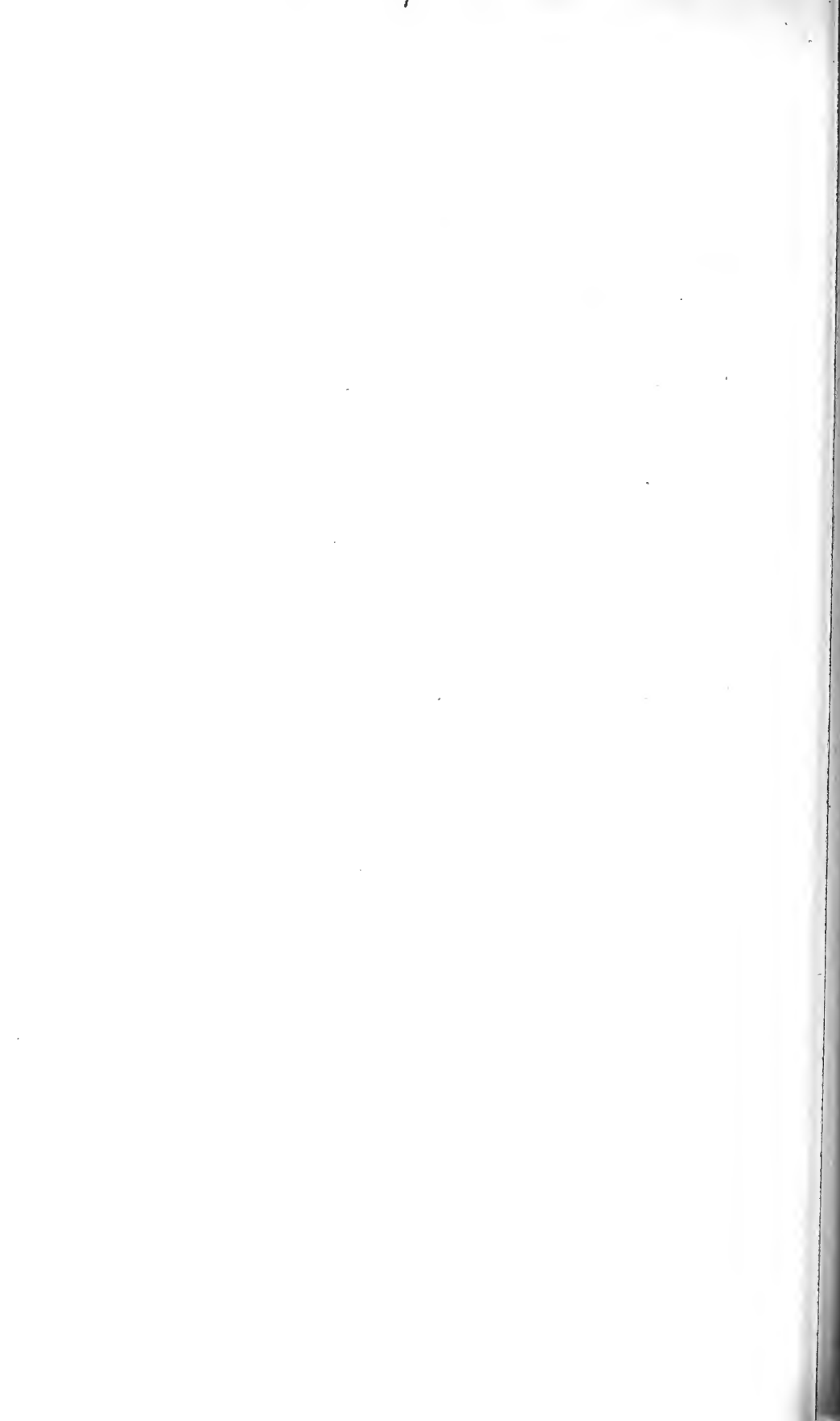
Some contention is made by the defendant as to the amount of the verdict. The only figures submitted to the jury of the damages claimed were \$1352.18; and the amount which he earned from the time of his discharge until the expiration of his contract, being the sum of \$872.81. The difference between these amounts is a little more than the amount of the verdict and it seems quite obvious that the jury arrived at its verdict by taking the substantial difference between the damages claimed and the amount earned. The plaintiff testified that he originally bought \$500.00 worth of stock in the defendant company and that he had been paid \$100.00 thereon but it certainly does not follow from that, that the jury based its verdict on the difference between the cost of his stock and the amount of his dividends.

It was also claimed that the court erred in instructing the jury. An examination of the instructions, however, shows that they were quite strongly in favor of the defendant and that the errors claimed on his behalf were at most, trivial and insubstantial.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON J. CONCUR.



191 - 25446

MAX BOLDT,

Appellee,

v.

WILLIAM BACHERACH,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

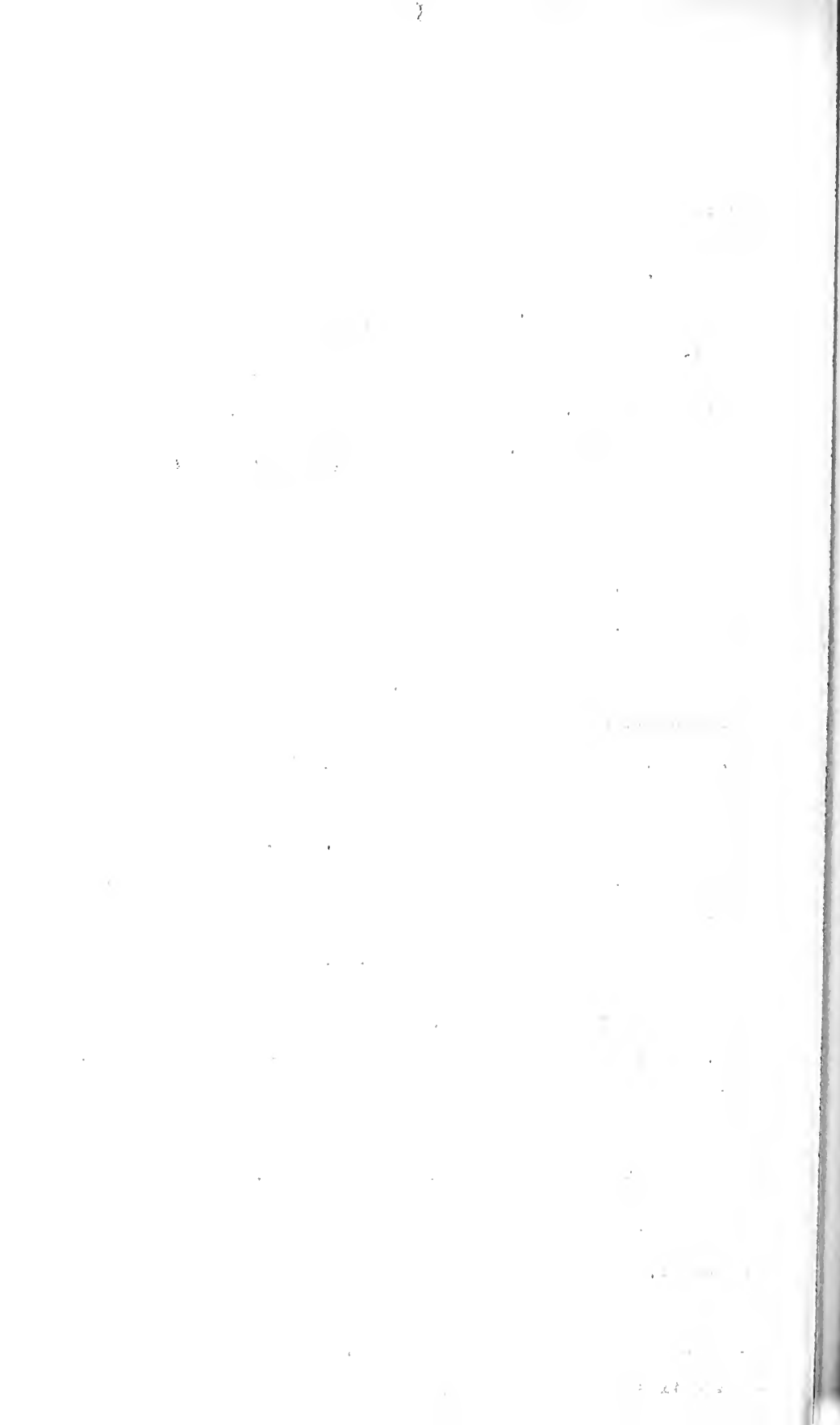
219 A. 654

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

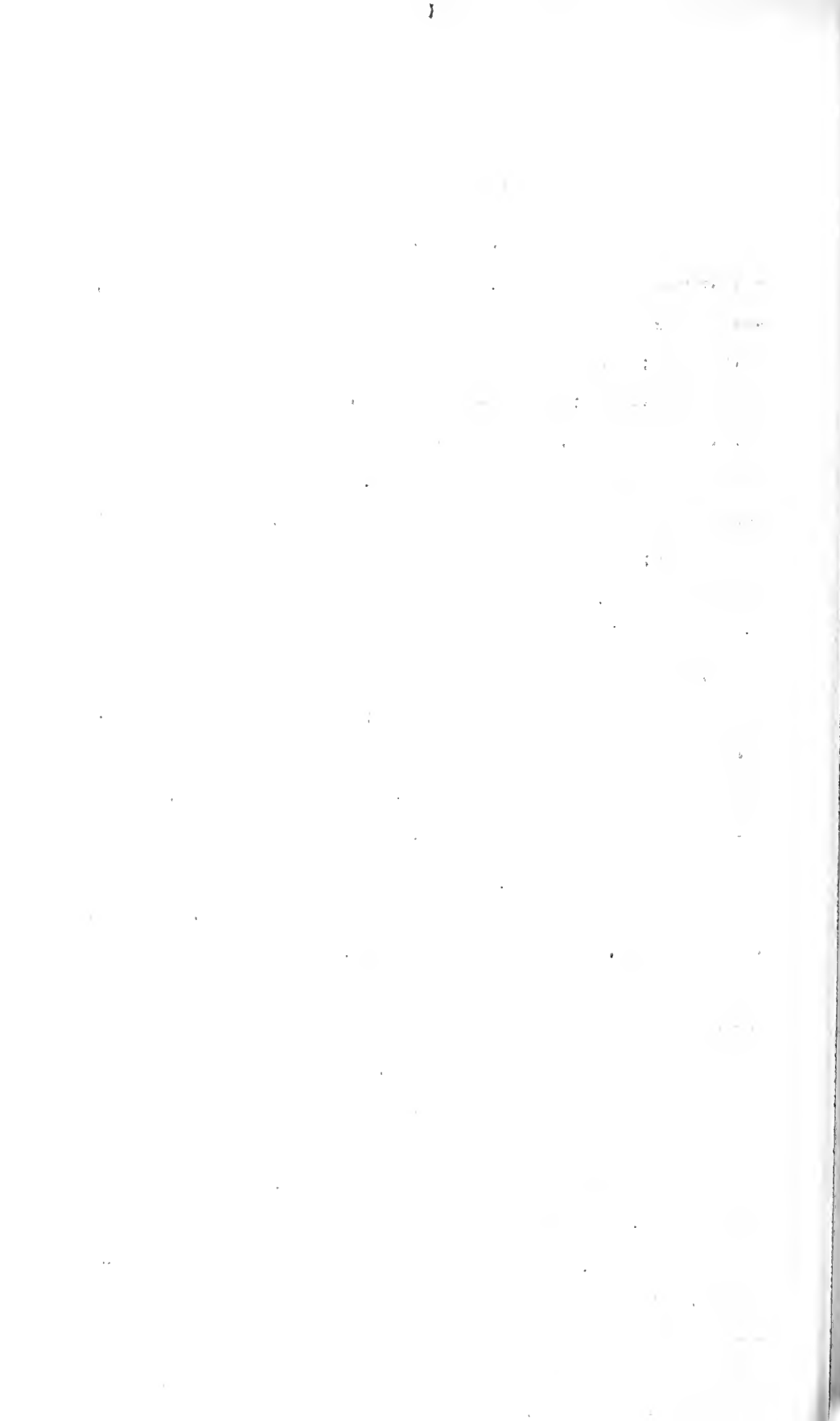
On September 26, 1916, at the intersection of Clarendon avenue and Kenesaw Terrace in the City of Chicago, an automobile belonging to the plaintiff and one belonging to the defendant collided, damaging that of the plaintiff and also injuring the plaintiff personally. The plaintiff brought suit. It was tried before a jury and resulted in a verdict and judgment in favor of the plaintiff and against the defendant in the sum of \$2,000.00.

Upon this appeal by the defendant from that judgment, the only contention is that the driver of the defendant's automobile at the time of the alleged negligence was neither his servant nor his agent and was not engaged in or upon any duty of, or for him, the defendant.

It is the theory of the plaintiff that one Michael McDermott, who was driving the automobile of the defendant at the time of the collision, was the agent of the defendant and was actually engaged in a duty for the defendant at the time of the accident.



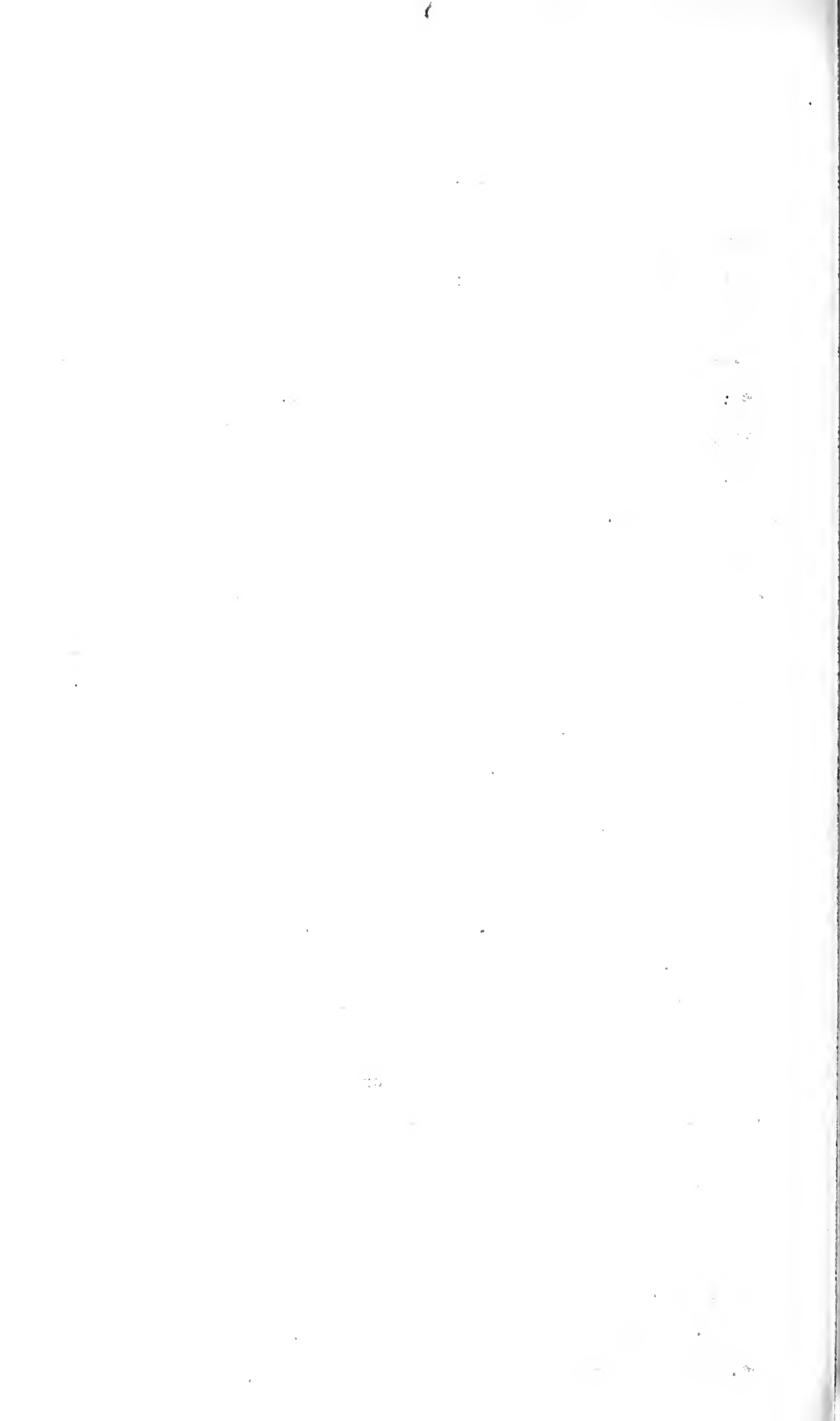
The defendant, who was called by the plaintiff as a witness on his behalf, testified that he, the defendant, was employed as a swimming instructor at the Illinois Athletic Club; that McDermott was not employed by him, but was a bricklayer; that on the morning of September 28, 1916, he, the plaintiff, was at the Illinois Athletic Club at about eight o'clock in the morning; that he had some talk with McDermott with reference to the use of his, the defendant's, automobile; that he did not send McDermott anywhere with the automobile; that he gave McDermott permission to use the automobile that morning to go to work to his place of employment on the North side, somewhere in the neighborhood of Sheridan Road and Wilson Avenue; that McDermott's business on that day was laying brick and that before that time McDermott had borrowed his automobile several times; that he paid nothing for the use of it; that at the time of the trial McDermott was a flying ensign in the United States Navy at Rockaway Beach; that he was never employed by him; that he, the defendant, never had a chauffeur; that on the day in question he loaned his car to McDermott just as a favor to him as a friend; that the relation between himself and McDermott was purely a social one; that McDermott had no interest in the car in any way; that he never paid him any money or any other consideration for driving the car; that he was accustomed to drive the car himself. On redirect examination, he testified that on the morning of the day of the disaster he got his car at the garage at 47th and Vincennes; that at the time he was living at 4321 Vincennes Avenue; that he and McDermott rode down town together in the car and that he permitted McDermott to go north with the car; that McDermott was to come back that evening to get him and they



were going on south that evening; that McDermott never worked for him at any time; that in driving down town in the morning sometime he would drive and sometimes McDermott would drive; that they did not always go down together in the morning; that some mornings he, the defendant, wanted to go down early and on those mornings McDermott had to take the street car; that on the morning in question McDermott drove the car down with him; that the only understanding as to what was to happen in the evening of that day was that when McDermott got through the car was to be returned to him, the plaintiff.

Evidence was introduced concerning an alleged conversation at the Illinois Athletic Club between the defendant and one Charles T. Harris. The witness Wenz, an investigator, called by the plaintiff, testified that shortly before the trial he and one Charles T. Harris went to the Illinois Athletic Club and met the defendant in the swimming department, and that he heard Harris ask the defendant if he was the man who had the accident in September, 1916, and that the defendant said, yes; that Harris then asked him if he owned the machine; that the defendant said, yes, and that the defendant said that McDermott was driving the machine; that the defendant also said that McDermott was on the defendant's duty at the time the accident happened.

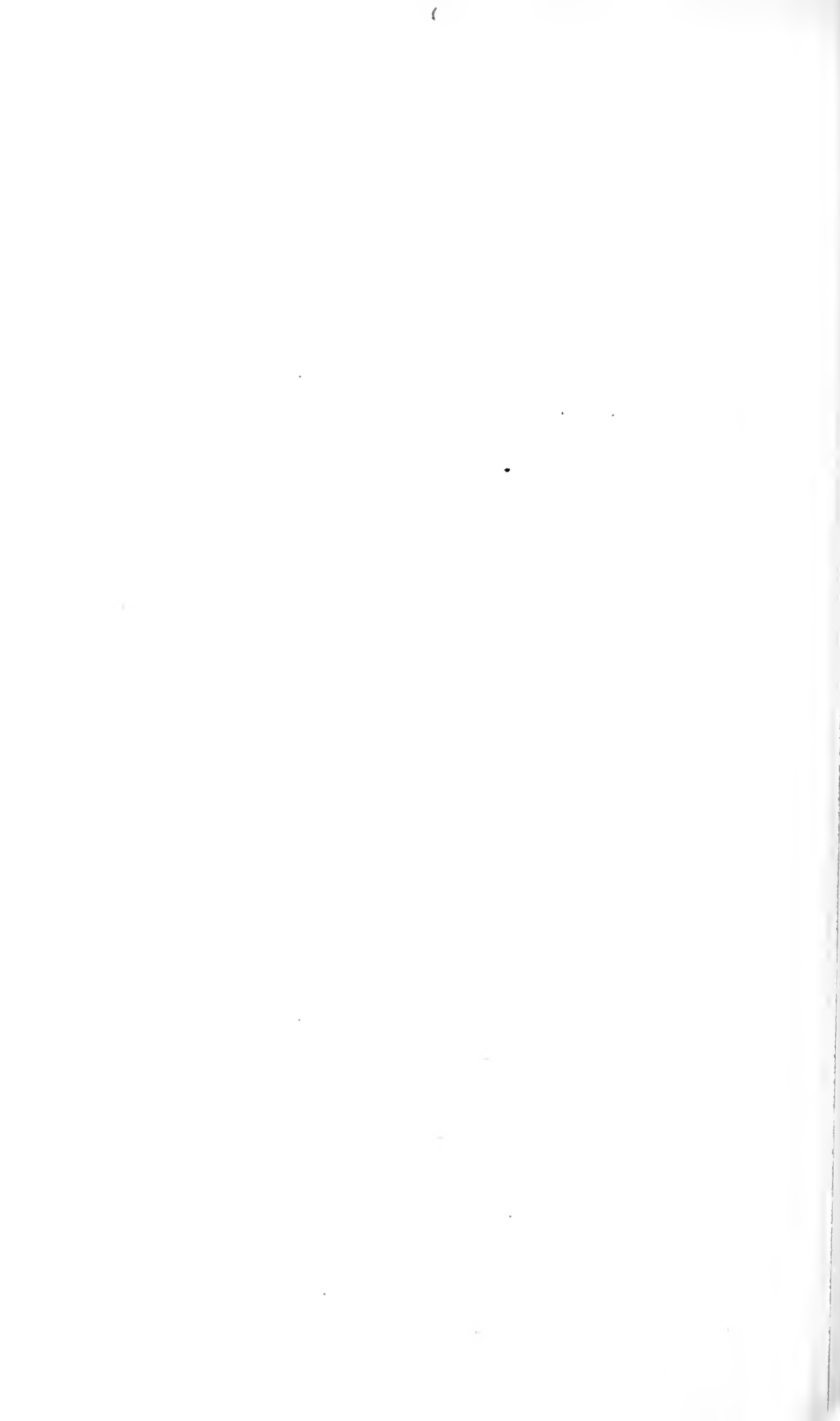
The defendant testified on his own behalf that, on the occasion referred to by Wenz, two men came to see him at the Illinois Athletic Club; that he did not know either of them; that the elder of the two said he wanted to discuss the case with him but that he, the defendant, refused to do so. He, also, contradicted the testimony of Wenz, that he said



McDermott, when driving his automobile, was "on his duty".

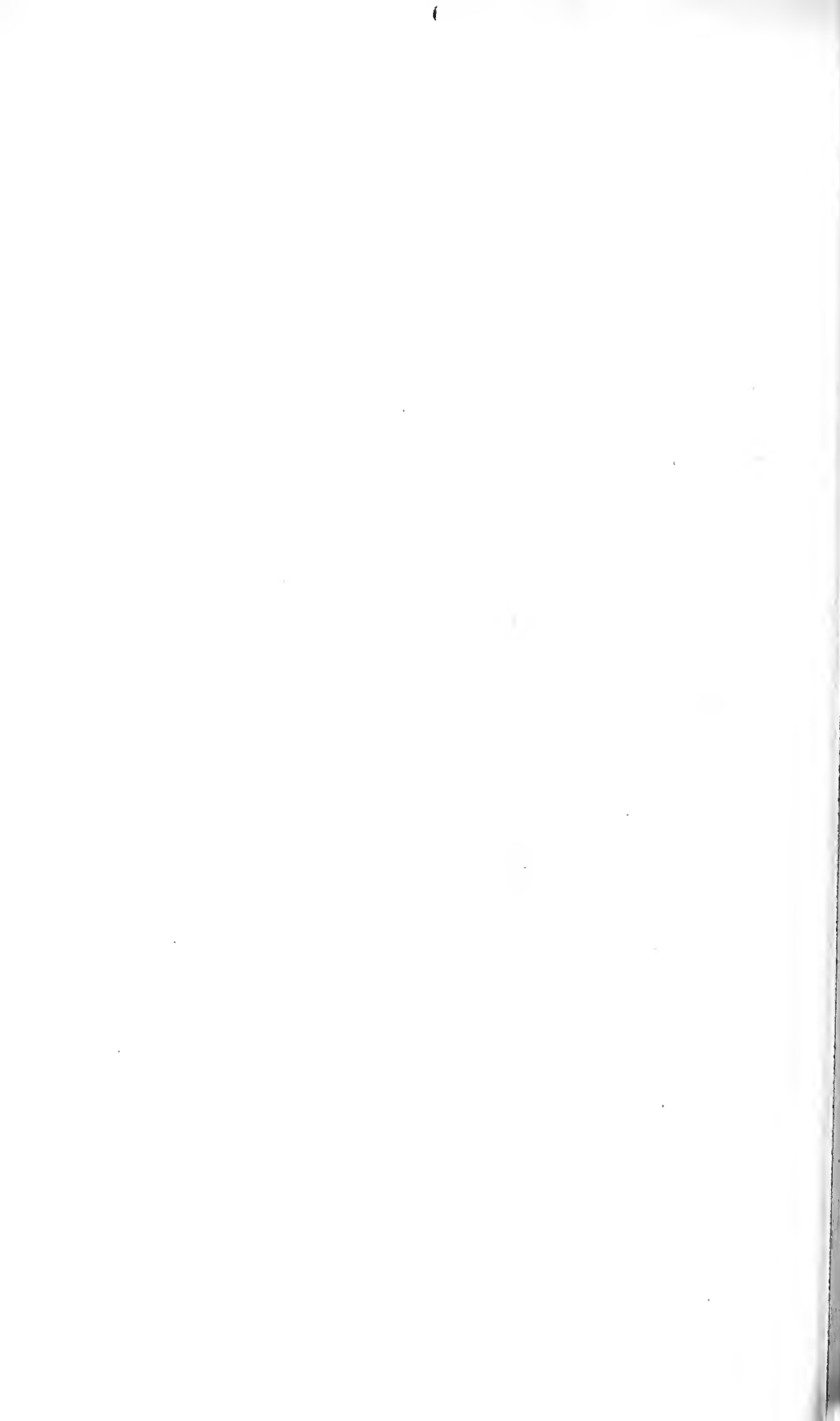
The defendant further testified that McDermott had been a friend of his since he was fifteen years of age when he was a junior member of the Y.M.C.A. where he, the defendant, was swimming instructor; that McDermott was on his team at the Illinois Athletic Club; that McDermott's family are his social friends; that at the time of the accident McDermott had considerable experience in driving cars; that he drove his mother's Cadillac for about four years but that he never employed him. It is conceded by counsel for both parties that the defendant is not liable for the negligence of the driver of his automobile unless the driver at the time of the alleged negligence was either his servant or agent. Arkin v. Paige, 237 Ill. 420. But, it is claimed on behalf of the defendant that the greater weight of the evidence shows that the driver of the defendant's automobile was neither the servant nor the agent of the defendant and that he was not engaged in or upon any duty of or for the defendant.

No contention is made in regard to the extent of the plaintiff's injuries, nor as to the amount of damages awarded nor as to the negligence of the driver of the automobile at the time of the collision. The sole question is, was the driver, McDermott, at the time of the collision the servant or agent of the defendant. The witness Wenz testified that on the Saturday before the trial in a conversation with the defendant the latter said that McDermott, the driver, was on his, the defendant's duty. The defendant and McDermott, socially, were close friends and had been for quite a number of years. The defendant stated that McDermott was a brick-



layer; that he was in the habit of borrowing the defendant's automobile and paid nothing for the use of it; that he let him have it just as a friend and that on the day in question he merely loaned it to him; that he never paid him any money nor any other consideration for driving the car. The defendant stated further that on the day in question he and McDermott rode down town together from 47th and Vincennes Avenue and that he permitted McDermott to go north with the car; that McDermott was to come back that evening to get him and they were going on south that evening; that in driving down town in the morning sometimes he would drive and sometimes McDermott would drive; that on the morning in question McDermott drove the car down with him; that the only understanding as to what was to happen in the evening of that day was, when McDermott got through, the car was to be returned to him, the plaintiff.

The jury have determined from the evidence that McDermott was neither the agent of the defendant or performing some duty for him. Of course, if they believed the testimony of Senz, and that testimony is entirely consistent with the testimony of the defendant as to the way in which the automobile was driven from time to time and used on the day in question, their verdict is proper and there is nothing in the record which would justify us in overriding it. Such agency as is claimed here is generally difficult to prove in a conclusive and overwhelming way. But, the evidence was considered sufficient by the jury and considering their superior position, having the witnesses before them so that they were in a better position to judge of their credibility than we are we do not feel justified in holding that their determination



on the subject of agency or duty is clearly against the weight of the evidence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.



217-25473

MOSES RICHARDSON,

Appellee,

vs.

INDIA TEA COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

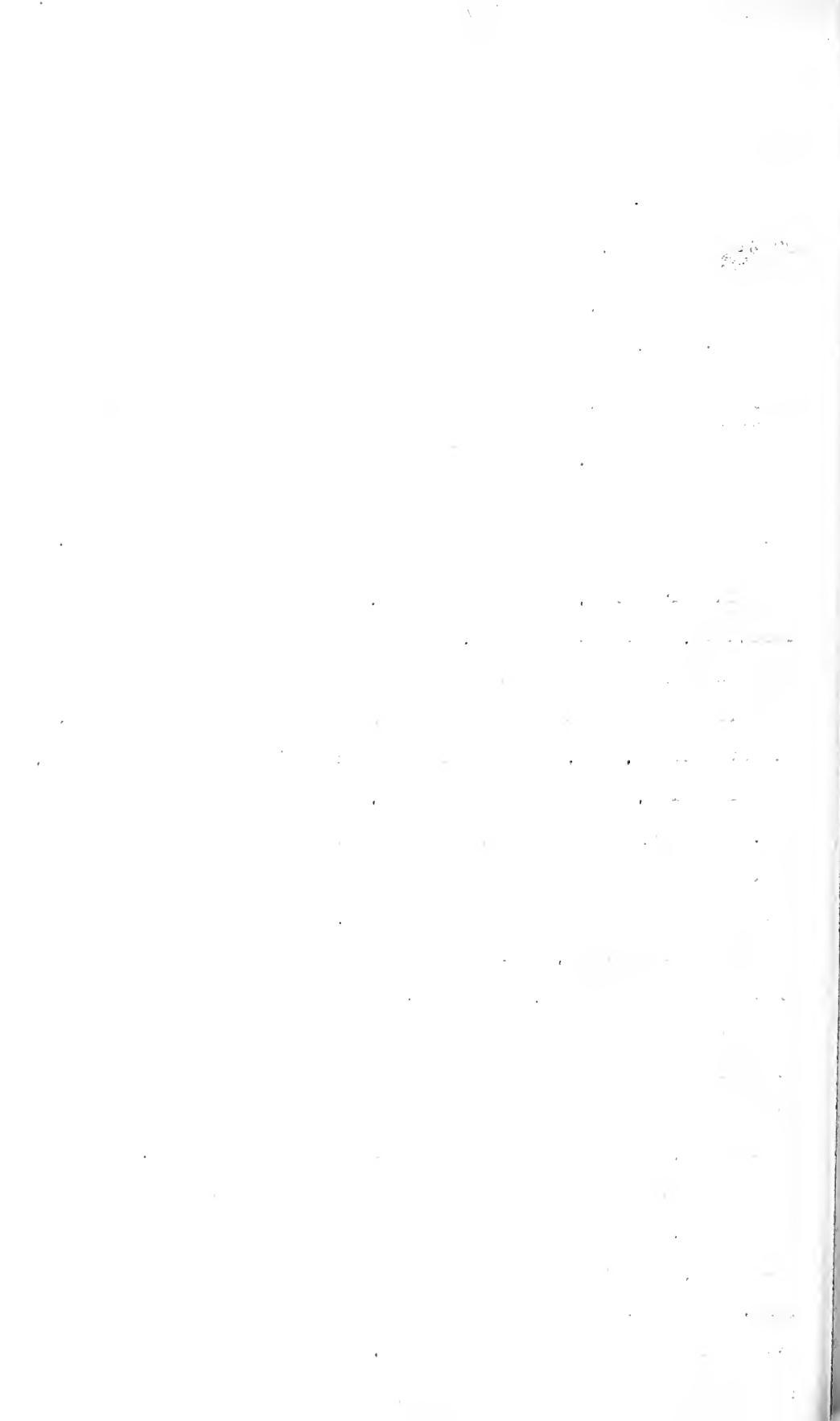
219 - A. 654

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Moses Richardson, brought suit against the defendant, India Tea Company, for damages for personal injuries sustained by reason of being struck by an automobile which it was alleged was negligently driven by an agent of the defendant. On November 12, 1917, between 8:30 and 9:00 o'clock in the morning, the plaintiff, an old southern negro, who said he was 81 years of age, an employee of the City of Chicago, while working at his business of street cleaning on the north side of 63rd Street between Princeton and Wentworth Avenues, was struck on the right hand by a Ford truck, which belonged to the defendant and was driven by one McMullen, its agent.

It is claimed on behalf of the defendant that the evidence does not disclose any negligence on the part of the defendant but shows that the plaintiff was guilty of contributory negligence; also that the damages allowed were excessive. We are of the opinion that both contentions are untenable.

The evidence of the driver of the truck is such that, quite obviously, we are not entitled to override the verdict of the jury. It is his testimony that he was going west on 63rd Street, evidently traveling in the car track, and that a street car came up behind him and sounded its gong; that he then turned out of



the tracks to the right and went on without stopping and in doing so struck the plaintiff who was going west on the street ahead of him, on the right hand side near the curb, sweeping. The only excuse given by the driver is that if the plaintiff had not put out, or pushed out, his arm in making the motion of sweeping, the automobile would have gone by without touching him. Considering that the plaintiff, as a street sweeper, had a perfect right to be on the street, and that he was only bound to exercise reasonable care in the performance of his function of street sweeping and that the driver of the truck saw him, evidently in time to have stopped his automobile without injuring him, as he was only going about four or five miles an hour, it would seem that the trial judge was entirely justified, particularly if he believed the testimony of the plaintiff, himself, and his witness Williams, in finding for the plaintiff.

In O'Connor v. Union R. Co., 73 N.Y. Supp. 606, where a street sweeper was struck, while working between the rails, by an approaching car, the court said, "It has been held that persons who are employed by a municipality and working upon the public highway are not bound to exercise the same degree of care while in the street that would be required of ordinary pedestrians *** nevertheless such persons are required to use reasonable care to avoid being run over." Also, in Smith v. Bailey, 43 N.Y. Supp. 856, the court said, "Undoubtedly those persons who are engaged in the streets in the public service cannot exercise the same diligence in getting out of the way of passing vehicles as those persons can who are simply crossing the streets and avenues; and it cannot be expected that they should because if their time were taken up by looking out for coming vehicles it would be impossible for them to carry on their work,

THE STATE OF NEW YORK

IN SENATE

JANUARY 1, 1908

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1, 1907

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK

PRINTING OFFICE

1908

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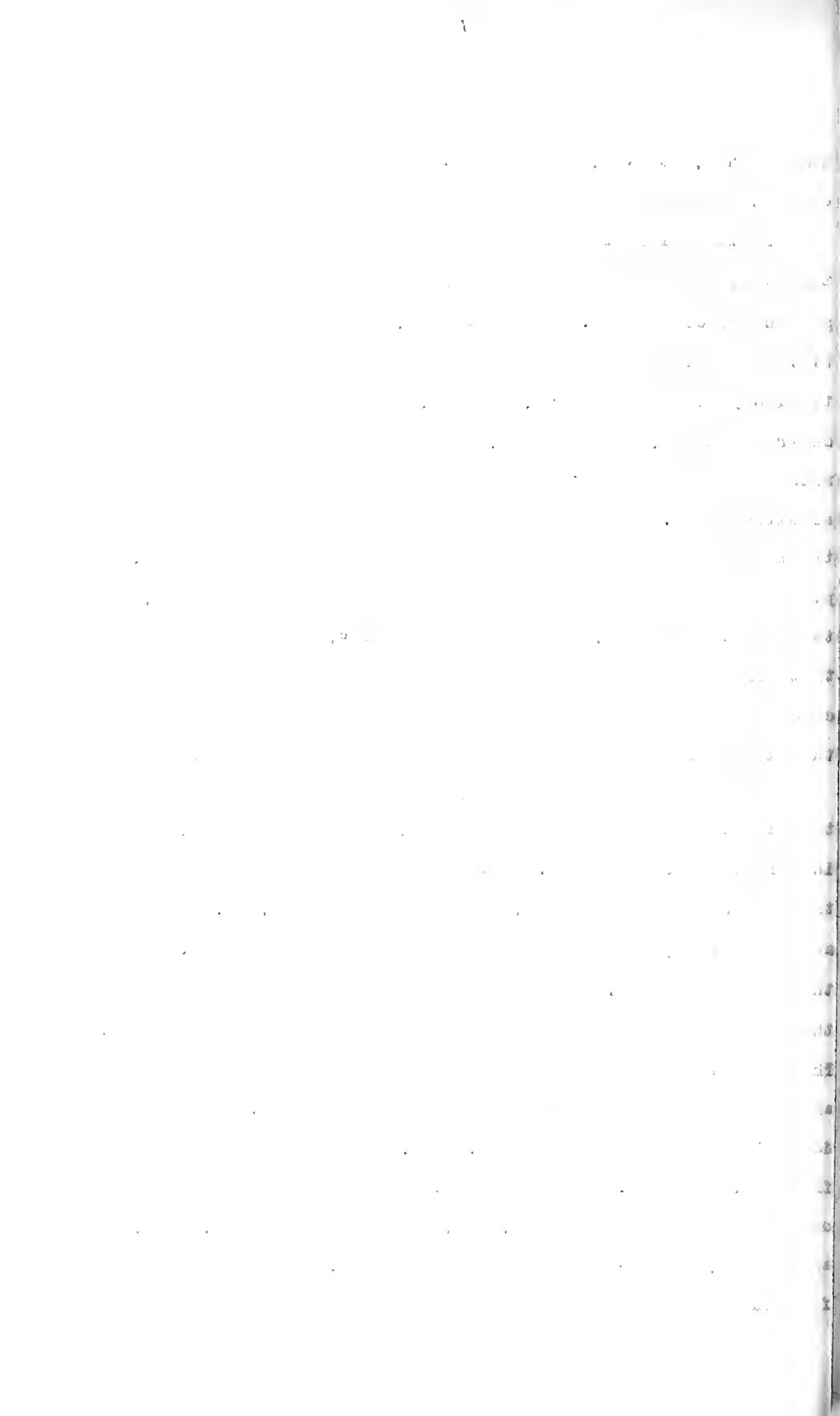
1908

ALBANY

They cannot, however, be reckless. They are bound to use reasonable care in seeking to avoid the dangers by which they are surrounded."

It is claimed on behalf of the defendant that the driver of the automobile sounded his horn and that the plaintiff should have gotten out of the way. That, however, is disputed. The witness Williams testified that no signal of any kind was given, and the testimony of the plaintiff, himself, although somewhat confusing on that subject, nevertheless, seems to intimate that the blow which he received and the sound of the horn took place about simultaneously. But that whole subject was considered by the trial judge and he passed upon it favorably to the plaintiff. The plaintiff was entitled to be on the street where he was and, at the time in question, he was doing his duty, and it is our opinion that from the evidence the trial judge was fully justified in concluding that the driver of the truck was negligent and that the plaintiff was not guilty of contributory negligence.

As to the damages; The injury consisted of the crushing of the distal joint of the little finger, on the right hand, resulting in a fracture of the bone. Dr. Morris testified that he treated the finger from November 12, 1917, until January 5, 1918, in all, about 25 times; that the medical services were worth \$50.00 but that he charged \$35.00; that the whole of the right hand up to the wrist was put in a splint in order to demobilize the finger. The plaintiff at the time of the injury was earning \$2.66 a day and was working eight hours a day, six days a week. Besides his doctor's bill he was charged \$3.00 for an ex-ray examination and from \$15.00 to \$20.00 for medicine. The plaintiff was evidently out of work from November 12, 1917, until about April 8, 1918, and apparently, owing to the injury to his hand. The trial judge figured that the plaintiff had lost 21 weeks work and that that



loss, together with the medical and medicine expenses, would amount to about \$400.00, and having in mind the pain and suffering, entered judgment for \$500.00. We are of the opinion that there was no error committed in fixing the amount of damages at \$500.00.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'Connor and Thomson J.J. concur.

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14 - 24995

SOUTH SLAVONIC CATHOLIC UNION,
a corporation, and CONTINENTAL AND
COMMERCIAL TRUST AND SAVINGS BANK,
a corporation, MICHAEL KLOBUCAR,
and JOHN KJELLANDER, as Clerk of
the Superior Court of Cook County,

Defendants in Error,

v.

ROBERT E. L. BROOKS, as Administra-
tor de bonis non of the Estate of
Frank Medosh, deceased,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT,

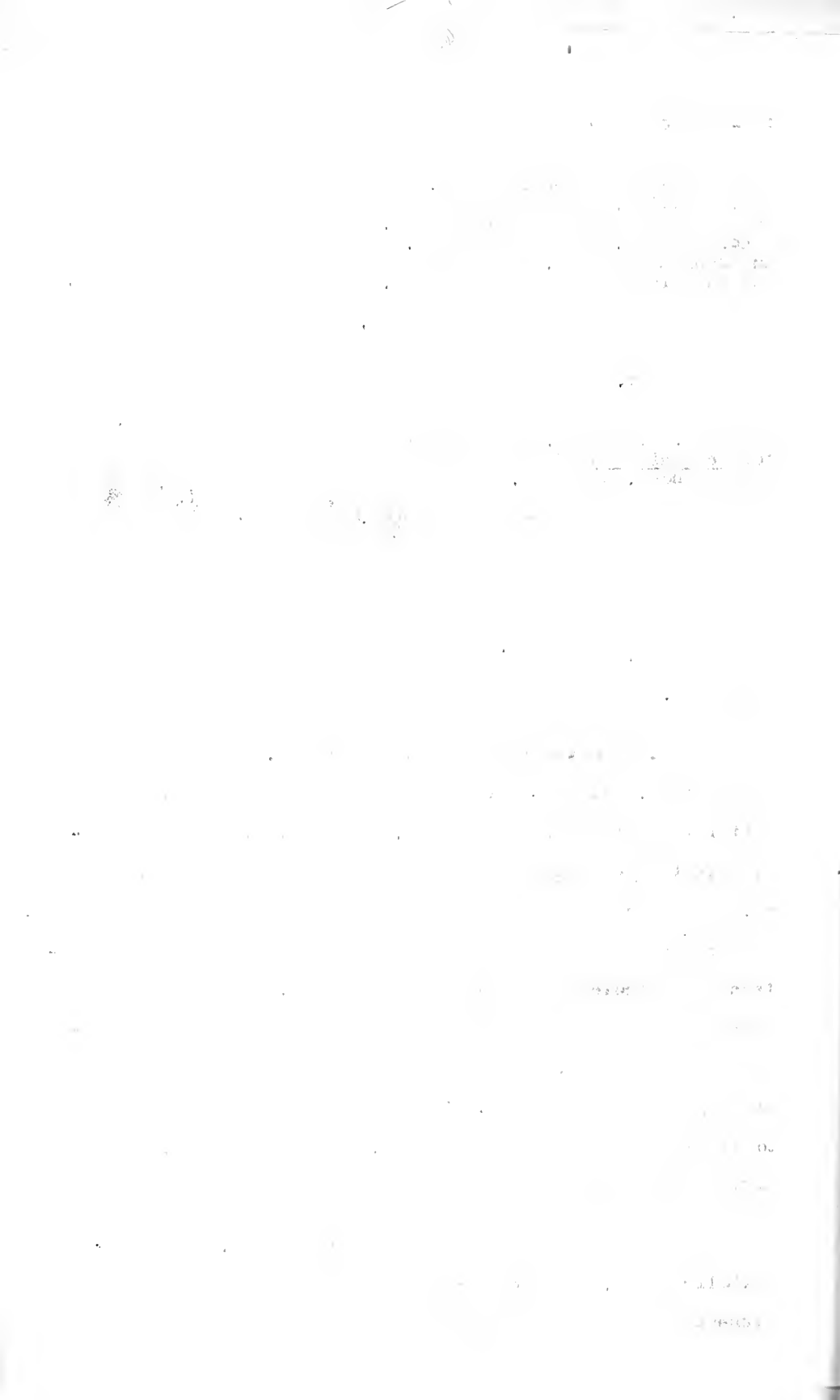
COOK COUNTY.

219 I.A. 654

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

The South Slavonic Catholic Union, a foreign fraternal society, authorized to do business in this State, filed a bill to restrain the defendant, Robert E. L. Brooks, as administrator de bonis non of the estate of Frank Medosh, deceased, from prosecuting two suits in the Municipal Court of Chicago, and praying that complainant be decreed to be the owner of sixteen certificates of deposit and one draft. After issues were joined the cause was referred to the Master who took the evidence and reported. He recommended that a decree be entered as prayed for in the bill. The decree was accordingly entered to reverse which defendant, Brooks, as administrator, prosecutes this writ of error.

The record discloses that complainant, South Slavonic Catholic Union, is incorporated under the laws of the State of Minnesota and was authorized to do business in this State on



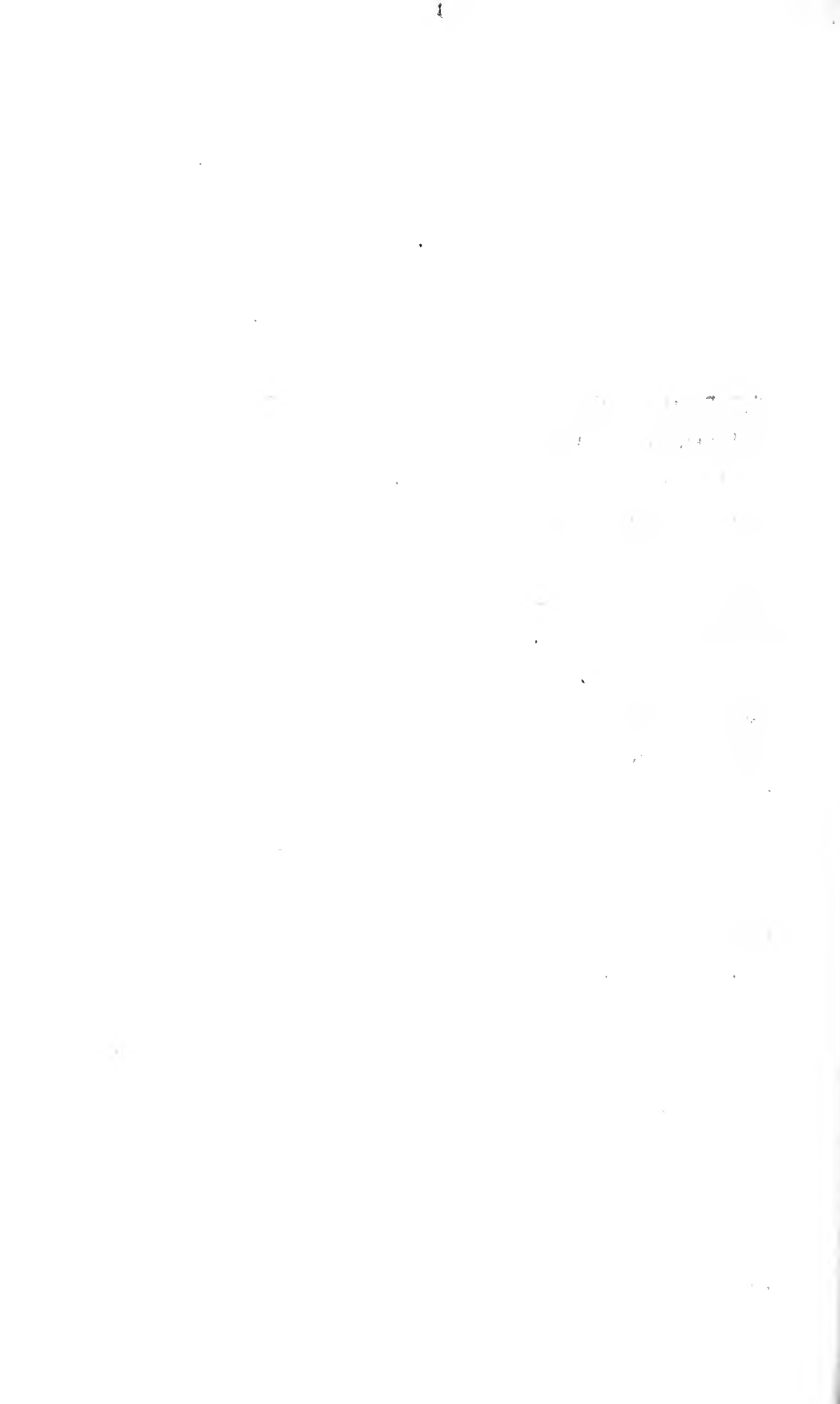
and after June 1, 1915; that one of the officers provided for by its by-laws was known as Supreme Guardian, and that the deceased Frank Medosh some time prior to his death was duly elected to that office and acted as such up until the time of his death; that when any member of the Union died leaving minor heirs for whom no guardian was appointed, it was the custom of the Union to remit to the Supreme Guardian, Frank Medosh, whatever funds were due such minors, to be held by him as such officer until they could be legally turned over to the minor beneficiaries; that at divers times sixteen members of the Union died leaving minor heirs for whom no legal guardian had been appointed, and in each instance the amount of the insurance was sent to Medosh as Supreme Guardian; that upon receipt of the money by him, or within a day or two thereafter, he purchased at such divers times the sixteen certificates of deposit in controversy; that before he died, October 10, 1912, he had in his possession some \$400.00 belonging to certain other minor beneficiaries which money he had recently received from the Union, and that he requested that the money be taken to the bank and exchanged for a draft payable to the Austrian consul. This was done the day of his death but after he died. A few days thereafter Medosh's widow suggested that this draft be exchanged for one payable to Medosh's successor in the Union, which was done. Shortly after Medosh's death the present counsel for the administrator, who were then representing the estate, took the matter of these certificates and the draft up with the officials of the Union as to how the inventory in the deceased's estate should be prepared concerning them. Thereupon counsel prepared and filed an inventory mentioning the certificates of deposit and the draft as property held in trust by Medosh

as Supreme Guardian. There was no dispute at that time that the property did not belong to the estate of the deceased, and it was agreed that all of it be turned over to the Union upon payment by the Union of \$150.00, which apparently was to go toward defraying the expenses of administration. A draft for this amount was executed and tendered to counsel for the estate, who thereupon presented a petition to the Probate court asking leave to turn this property over to the Union, and on March 3rd, 1913, an order was accordingly entered. After this it seems that counsel for the administrator demanded \$350.00 in lieu of the \$150.00 which had been tendered but not accepted, before the administrator would turn over the certificates and the draft. To this the Union agreed and forwarded a draft for the amount demanded which was tendered to counsel for the administrator, which after some delay was refused, and at that time it was stated that the administrator would turn over the certificates and the draft upon payment of \$500.00, which the Union apparently refused to do. May 22, 1914, the Probate court entered an order on the petition of the administrator authorizing him to begin two suits in the Municipal Court of Chicago against the two banks who issued the certificates and the draft to enforce collection on them. Prior to the filing of the suits both banks had refused to make payment on these obligations to the administrator. It also appears that sometime during the proceeding in the Probate court the Union filed its claim against the estate for the amount of the certificates and the draft, which claim was afterwards dismissed for want of prosecution. Afterwards this bill was filed to restrain the prosecution of the suits in the Municipal Court and praying that the Union be decreed to be the owner of the certificates and the draft.



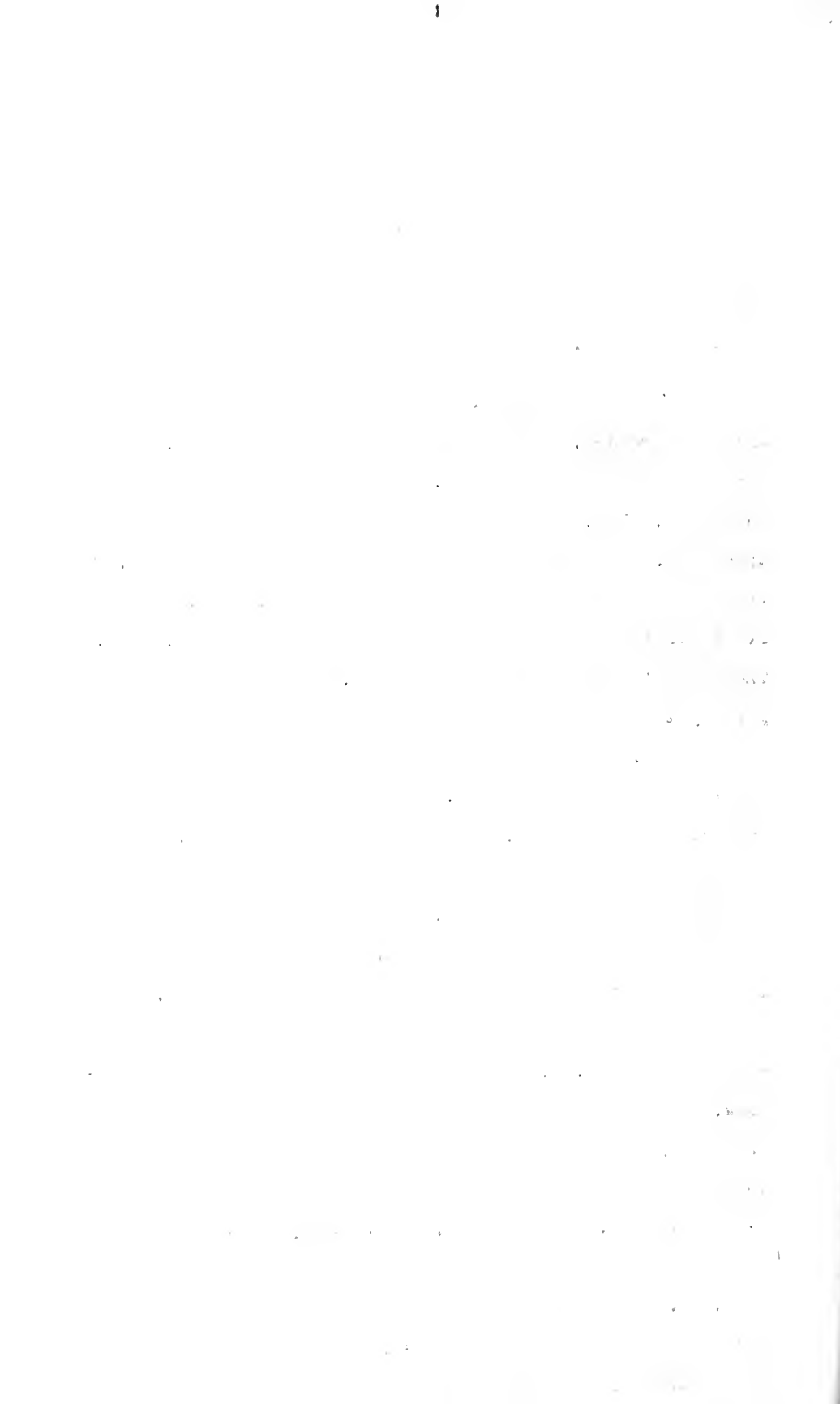
A petition for the removal of the administrator was on hearing January 29, 1916, before Judge Horner of the Probate Court and incidentally the question of the ownership of these certificates and draft was gone into, at which time Judge Horner stated to counsel for the administrator that it was perfectly apparent that this property did not belong to the estate but belonged to the Union. Of course it is the law that if there is a dispute between the administrator and a third party as to whether certain property belonged to the estate or to the third party the Probate Court has no jurisdiction to try such an issue, but the parties must be relegated to the proper forum, and it is apparent that this is the reason why a specific order directing the administrator to turn this property over to the Union was later corrected so as to show that leave was given the administrator to do so.

It seems to be the administrator's position that the moneys received from the Union by Frank Medosh in his lifetime as Supreme Guardian were mingled with his own funds and, therefore, that the property of the Union could not be specifically identified and consequently the Union was not entitled to a decree in its favor. And a further contention seems to be that since the certificates of deposit bore the name of Frank Medosh, Supreme Guardian, they belonged to his estate. These contentions were not sustained by the Master nor are they sustained by the evidence. It is clear to us from a consideration of all the evidence that these funds belonged to the Union and were held by Frank Medosh as an officer of that Union and, therefore, the decree awarded in favor of the Union was proper and the only one that could be entered. In fact, no claim of any merit seems

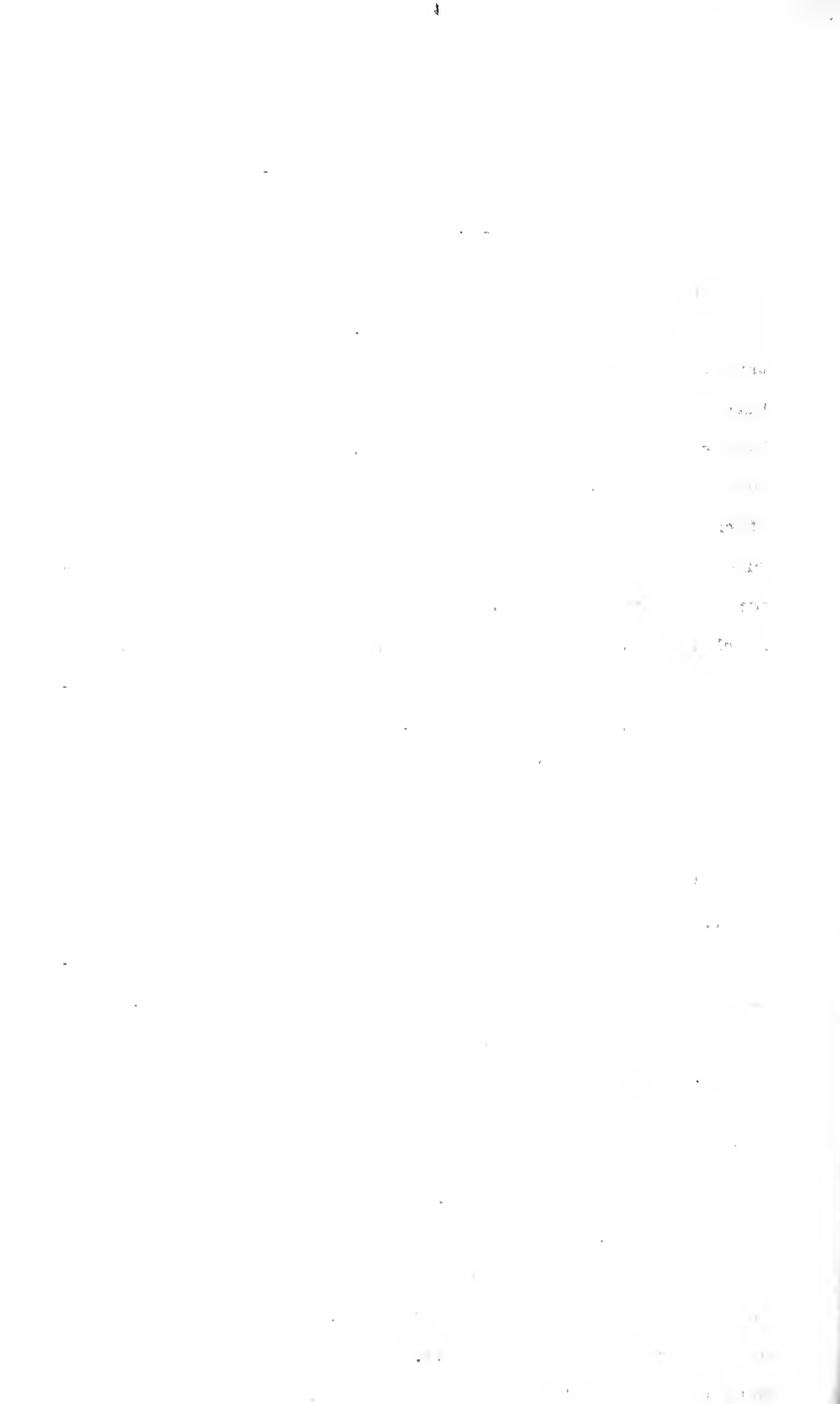


to have been made that they belonged to the estate at any time, and it appears that delivery of them to the Union was not made for the reason that the Union would not pay the \$500.00 demanded.

The administrator appointed by the Probate Court was John Kranjec. Subsequently he died and Elmer C. Rathfon was appointed to succeed him. Later on Rathfon died and on August 14, 1916, the present administrator de bonis non was appointed. He intervened in the instant case October 7, 1916. The case was not referred until February 20, 1918, and the first evidence was taken before the Master March 19, 1918. The Master's fees were taxed at \$514.20 and decreed to be paid by the administrator and in default thereof an execution issued. Complaint is made that the chancellor erred in allowing the master \$300.00 for special services in the case at the rate of \$5.00 per hour for sixty hours. From an examination of the entire record we think the allowance was warranted. It was error, however, to award an execution against the administrator as such. The proper order is that payment be made in due course of administration. But counsel for the Union state that these costs should be taxed against Robert E. L. Brooks individually because, as he argues, it is apparent that this suit has been maliciously and wrongfully prosecuted without any semblance of merit, and that in such case it is proper to assess the costs against the individual. In Marshall, Admr. v. Coleman, 187 Ill. 556, in passing on the question now under consideration the court said, (p. 586) "The complaint is made that the costs were taxed against appellant personally and not against him as administrator. This action of the lower court was proper



because the costs of this proceeding have been caused by the misconduct of the appellant himself." Counsel for the administrator in reply to the contention that the costs should be taxed against the administrator personally because the suit has been wrongfully prosecuted says, "Then suit to recover on these certificates was instituted by the administrator after first getting an order from the Probate Court. The Union and the bank both admitted the right of the administrator to succeed and recover the amount due upon the statement of claim in the suit now pending in the Municipal court, but by its bill seeks to restrain the administrator from performing its duty, and under such circumstances it was his duty and no negligence or malice can be charged to plaintiff in error." The reference there made to the order of the Probate court is the order authorizing the administrator to begin the suits in the Municipal court on the certificates and the draft. It is clear to us that if all the facts were brought before the Probate Court no such order would have been entered for the inventory expressly stated that the property did not belong to the estate. And the fact that no defense could be made to the suits in the Municipal Court is no answer for that is the reason why equity assumed jurisdiction in this case. We think it clear that the costs incurred in this case except the filing fee of \$10.00 and \$13.00 which was paid to the sheriff, were all brought about by plaintiff in error which should have been avoided by turning over the property to the Union. In these circumstances, under the authority of the Marshall case, the \$514.20 costs incurred before the master should be taxed against Robert E. L. Brooks individually.



He was appointed administrator de bonis non about a year and one half before any of this expense was incurred and had ample time, therefore, to investigate the merits. Of course, if he was simply following the advice of his counsel, that is a matter to be adjusted between them, but it cannot be done in this proceeding.

The decree of the Superior Court of Cook County is affirmed in all respects except as to the taxing of the \$514.20, and as to such it is reversed and remanded to the Superior Court which directions to tax these costs against Robert E.L. Brooks, individually.

AFFIRMED IN PART;
REVERSED IN PART; and
REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

72 - 25317

P. F. CUNNINGHAM,
Appellant,

v.

WALLACE S. CLARK, J. MILTON
TRAINER and ARTHUR R. CLARK,
doing business under the name
and style of A. R. Clark &
Company,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2191

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought suit against the defendants
to recover \$1175.00 which he claimed was due him under a
written contract for labor and materials furnished the
defendants under the name and style of A. R. Clark & Com-
pany. At the close of plaintiff's case there was a direct-
ed verdict in favor of defendants to reverse which plain-
tiff prosecutes this appeal.

Plaintiff's claim is based on a balance due him
for lathing and plastering certain flat buildings under
a written contract which he entered into with A. R. Clark
& Company. The affidavit of merits set up that defendants
were not partners but that A. R. Clark & Company was a cor-
poration and consequently whatever claim plaintiff had was
due and owing not from defendants but from the corporation.
The contract recites that it is between A. R. Clark & Com-
pany, "parties of the first part, and P. F. Cunningham,
party of the second part", and is signed, "A. R. Clark &
CO. (Seal)", and "P. F. Cunningham (Seal)". The considera-
tion mentioned in the contract is \$2675 on which \$1500 was

paid leaving a balance of \$1175.

Plaintiff testified that he had done lathing and plastering for the defendants for about fifteen years; that all of the contracts were signed by A. R. Clark & Company and that none of them were signed by the three individual defendants. He further testified that after the work was completed under the terms of the written contract he demanded payment of the three defendants on different occasions and that they said they did not have the money at the time with which to pay him; that the defendants J. Milton Trainer and Wallace Clark told him on one occasion when he asked for payment that they did not have the money then but that they would give him in payment some real estate which they had on the South Side; that afterwards A. R. Clark took him out and they looked over this property, two houses, and that plaintiff told them he could not handle same but that he wanted payment in cash; that he had never heard that A. R. Clark & Company was a corporation until the defendants filed their affidavit in this case; that he had worked on a number of buildings under contracts which he had made with A. R. Clark & Company and that wherever such buildings were built on property owned by Wallace Clark and J. Milton Trainer they were always out looking over the property and seeing that the work was properly done; that on one or two occasions Wallace Clark gave him his personal check in payment of work done although most of the time payments were made by A. R. Clark & Company.

We think plaintiff made out a prima facie case and that the court erred in directing a verdict for the defend-

ants. Even if the defendants were not actually partners as between themselves, yet we think the evidence tended to show they so did business with plaintiff as to be liable to him as partners. In Fisher v. Bowles, 20 Ill. 396, the court said, "Partnerships cannot always be proved by written articles. In fact, in very many cases writings do not exist * * * In such cases, and in all cases, the rule is, if a person suffer his name to be used in a business, or otherwise hold himself out as a partner, he is to be so considered, whatever may be the agreement between him and the other partners. * * * Whether they are partners as to others depends on their conduct."

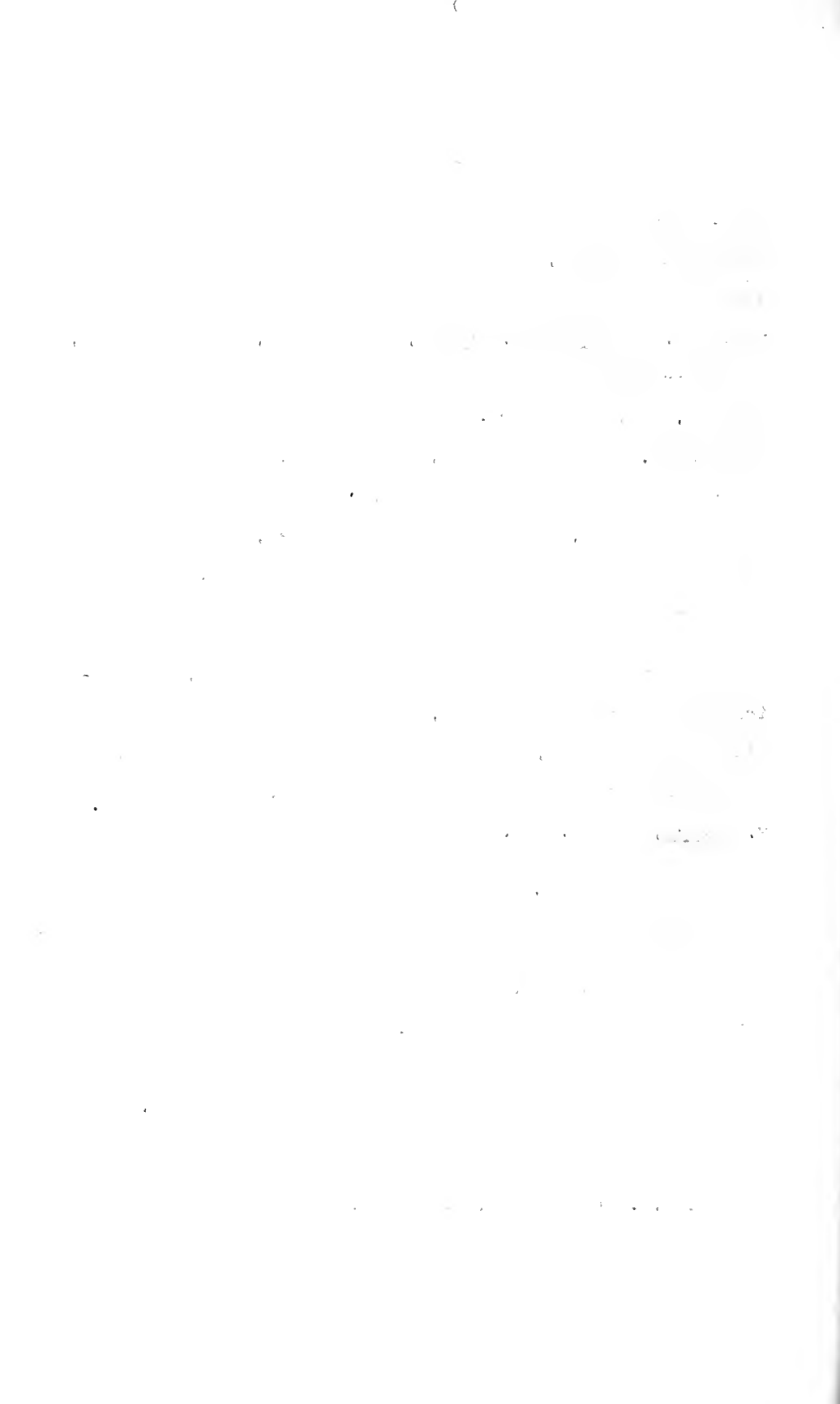
"A party permitting his name to be used, or holding himself out as a partner, will be equally responsible with other partners, although he may receive no profits, for the contract of one is the contract of all." See also Poole v. Fisher, 62 Ill. 181.

In the instant case we think the court should have required the defendants to go forward with their evidence.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. and THOMSON, J. CONCUR.



CLARKE-McELROY PUBLISHING
COMPANY, a corporation,

Appellant,

v.

CHICAGO HEBREW INSTITUTE,
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

2191 A. 655

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal plaintiff seeks to reverse a judg-
ment of the Municipal Court of Chicago.

The facts so far as it is material to state them,
are that plaintiff, Clarke-McElroy Publishing Company, a
corporation, did some printing work for Julius Shapera, and
when he was indebted to them in the sum of about \$800, they
requested that the bill be paid or some security given be-
fore further work would be done. The coupon Shapera, who was
employed by defendant, Chicago Hebrew Institute, a corpora-
tion, assigned to the Woodlawn Trust and Savings Bank for
plaintiff \$600 which was due him from defendant. Defendant
was notified of this assignment and was requested to pay
this amount to the bank for the plaintiff but disregarded
this demand and shortly afterwards paid to Shapera \$588.50,
which was the exact amount it owed him at the time of the
assignment. Afterwards this suit was brought.

In addition to the foregoing facts, the evidence
showed that a few months after the assignment and after the
payment by defendant to Shapera of the \$588.50, plaintiff in

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another suit in the Municipal court recovered a judgment against Shapera for \$1241.97. It brought garnishment on this judgment and served defendant here as garnishee. The garnishee answered that it owed Shapera \$110 and on this answer a judgment was entered for this amount and it was paid. As we understand the record the trial judge held that the judgment entered in the garnishment proceedings was res judicata of the matter in controversy in the instant case apparently on the theory that if the defendant, Chicago Hebrew Institute, owed Shapera the \$588.50 in addition to the \$110, it should have been determined in the garnishment proceedings, and this is the argument made by counsel for defendant here. This was error. After the assignment was made and notice given to the defendant, it could not then pay Shapera in violation of the assignment and notice, but to discharge itself from this liability it would be required to pay the bank for plaintiff. Therefore, when the Chicago Hebrew Institute answered as garnishee it could not there truthfully say that it owed Shapera \$588.50. It follows that the judgment entered in the garnishment case was not res judicata.

The defendant also argues that the evidence shows that the \$588.50 was paid by it to Shapera after its representative had conferred with the bank and with a representative of the plaintiff and was told that neither the bank nor plaintiff had any claim against Shapera, and, therefore, payment by it to Shapera was justified. The trial court found against them on this question of fact and it is not contended that this finding is against the manifest weight of the evidence. This being true, of course, we cannot disturb such finding. However, we have considered the evidence and think

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the trial court was justified in the finding made.

Defendant further contended that the assignment was invalid for the reason that a person cannot split up a claim he has by assigning a part of it. It is sufficient to say in answer to this contention that at the time the assignment was made all of the indebtedness due from defendant to Shapera was assigned, for it is stipulated that at that time there was due from defendant to Shapera \$588.50. The fact that he afterwards continued to work for defendant and that it became further indebted to him can in no way effect the validity of the assignment.

It follows that the payment of the \$588.50 to Shapera was not warranted and since there was no jury trial and the amount is not in dispute, it is not necessary to remand the cause, but the judgment of the Municipal Court of Chicago will be reversed and judgment entered in this court in favor of plaintiff and against defendant for \$588.50.

REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. AND THOMSON, J. CONCUR.



123 - 25377

FRANK N. MINNINGER,

Appellee.

v.

J. H. HAWKINS,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

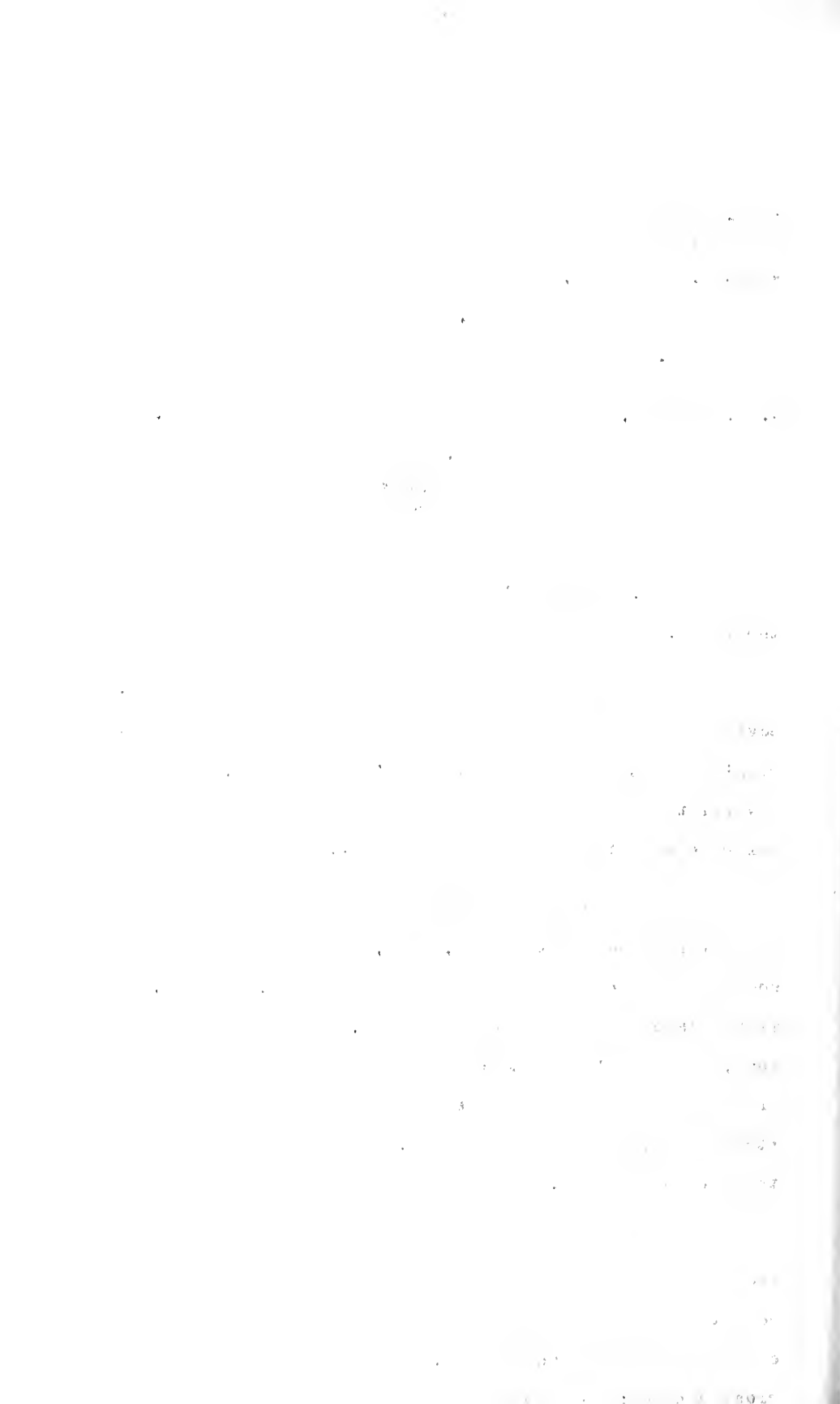
2191A 655

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been suffered by him on account of being struck by defendant's automobile. There was a verdict and judgment in his favor for \$325, to reverse which defendant prosecutes this appeal.

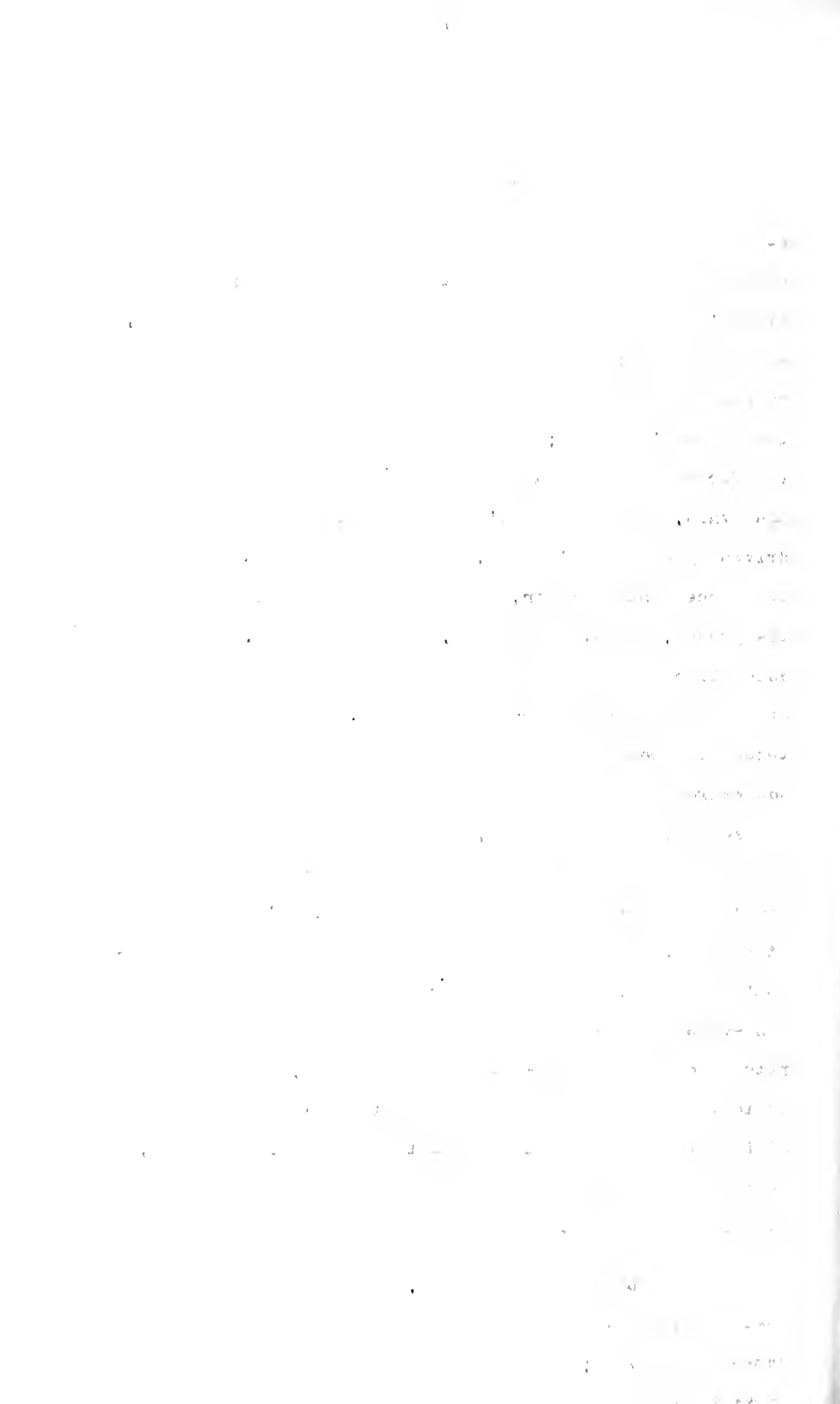
The record discloses that about one o'clock in the afternoon of September 5, 1916, plaintiff was walking south on the west side of Michigan Boulevard, Chicago, and as he was crossing Jackson Boulevard, which runs east and west, defendant's automobile which was being driven south in Michigan Boulevard turned west into Jackson Boulevard and struck and injured the plaintiff. It is for these injuries that plaintiff sues.

Evidence offered on behalf of plaintiff tended to show that there were a great many automobiles on Michigan Boulevard at the time in question and also a great number of persons walking on the west sidewalk of that street across Jackson; that there was a policeman regulating traffic



at the intersection of the two streets standing near the center of Michigan at the north side of Jackson; that he had signalled for the southbound traffic on Michigan to stop, which was done; that the plaintiff and a number of persons walking south on the west sidewalk stopped at Jackson at the officer's signal; that after a short space of time the traffic was released and plaintiff started across Jackson Boulevard, when defendant's automobile, which was being driven by defendant's wife, came south in Michigan and around the corner into Jackson, struck the plaintiff, threw him to the ground, ran over his feet, and injured him. Before the automobile could be stopped it ran up on the north sidewalk of Jackson Boulevard west of Michigan. The evidence further tended to show that plaintiff was walking across Jackson Boulevard and just before he stepped off the sidewalk into the roadway of that street, he looked to the east but saw no automobiles coming from that direction; that as he was about to the center of the roadway defendant's automobile struck him. The evidence also tended to show that defendant's automobile was being driven south in south in Michigan Boulevard and turned around the corner into Jackson at the rate of about ten or twelve miles per hour; that it came up to the north side of Jackson just about the time that the officer released the southbound traffic on Michigan and, therefore the automobile did not stop but continued around the corner into Jackson.

On behalf of defendant, he and his wife testified that plaintiff was coming from the south to the north across Jackson Boulevard; that their automobile when it reached Jackson, stopped in accordance with the signal of the officer;



that after the officer released the traffic it started up slowly and proceeded around the corner at the rate of four to six miles per hour.

Defendant contends that the evidence shows that the plaintiff was guilty of contributory negligence since the day was clear and he did not look to the east before going into the roadway of Jackson Boulevard. We think this contention is not sustained by the evidence, for the plaintiff testified that he did look to the east before stepping into the street. The police officer only testified that plaintiff did not look to the east for approaching automobiles when he saw him, which was after plaintiff was about three feet off the sidewalk into the street. We think this question was properly one for the jury. Heidenreich v. Brenner, 260 Ill. 439.

Defendant also contends that the court erred in giving instruction No. 7 on behalf of plaintiff. That instruction told the jury that the statute of this State provides in substance that no person shall drive a motor vehicle upon any public highway at a greater rate of speed than is reasonable and proper having regard to the traffic and use of the way, or so as to endanger the life or limb of any person; that it further provides that if a motor vehicle in going around a corner or curve in a highway when the operator's view is obstructed does so at a greater rate of speed than six miles per hour, such fact shall be prima facie evidence that the vehicle is running at a greater rate of speed than is reasonable and proper, having regard to the traffic and use of the way. The argument is that this instruction was misleading in that it was not supported by the evidence; that

the evidence showed that the plaintiff was walking south on the west sidewalk of Michigan Boulevard into Jackson Boulevard all the time in plain view of the southbound traffic, that there was nothing at the corner or curve to obstruct the operator's view and, therefore, the instruction was erroneous. With this contention we cannot agree. The statute clearly applies wherever a motor vehicle is being driven around a corner and the view is obstructed. In the instant case there was a large office building at the northwest corner of Jackson and Michigan Boulevards. Therefore, defendant should not have gone around this corner at a greater rate of speed than six miles per hour. If he had not done so, the car would have been under control. Further, it must be presumed that plaintiff knew of this law and, therefore, would not be required to use the same degree of care that he would be required to use if the statute permitted the rounding of a corner at a greater rate of speed than six miles per hour. We think the instruction was applicable and that there was no error in giving it.

Defendant next contends that the declaration fails to state a cause of action and that its motion in arrest of judgment should have been sustained. In support of this it is said that there is no allegation in the declaration that defendant owed any duty to plaintiff, and that this is always a necessary element in a case such as the one at bar.

It is undoubtedly the law that plaintiff could not recover in this case if the defendant owed him no duty, and if there was no such allegation in the declaration, the judgment could not be sustained. But upon an examination of the declaration

we find that while it is not alleged in so many words that defendant owed a duty to the plaintiff, yet we think the facts alleged showed such to be the case. The declaration, in substance, alleged that the plaintiff, while in the exercise of all due care and caution for his own safety, was walking across Jackson Boulevard, the defendant, carelessly negligently, and wrongfully ran his automobile around the corner at a greater rate of speed than was provided by the statute, and that as a result thereof plaintiff was injured. We think this sufficient. Other counts set up other negligence which it will not be necessary to discuss.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

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145 - 25399

JOE CAVANARO,

Appellant,

v.

CITY OF CHICAGO,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

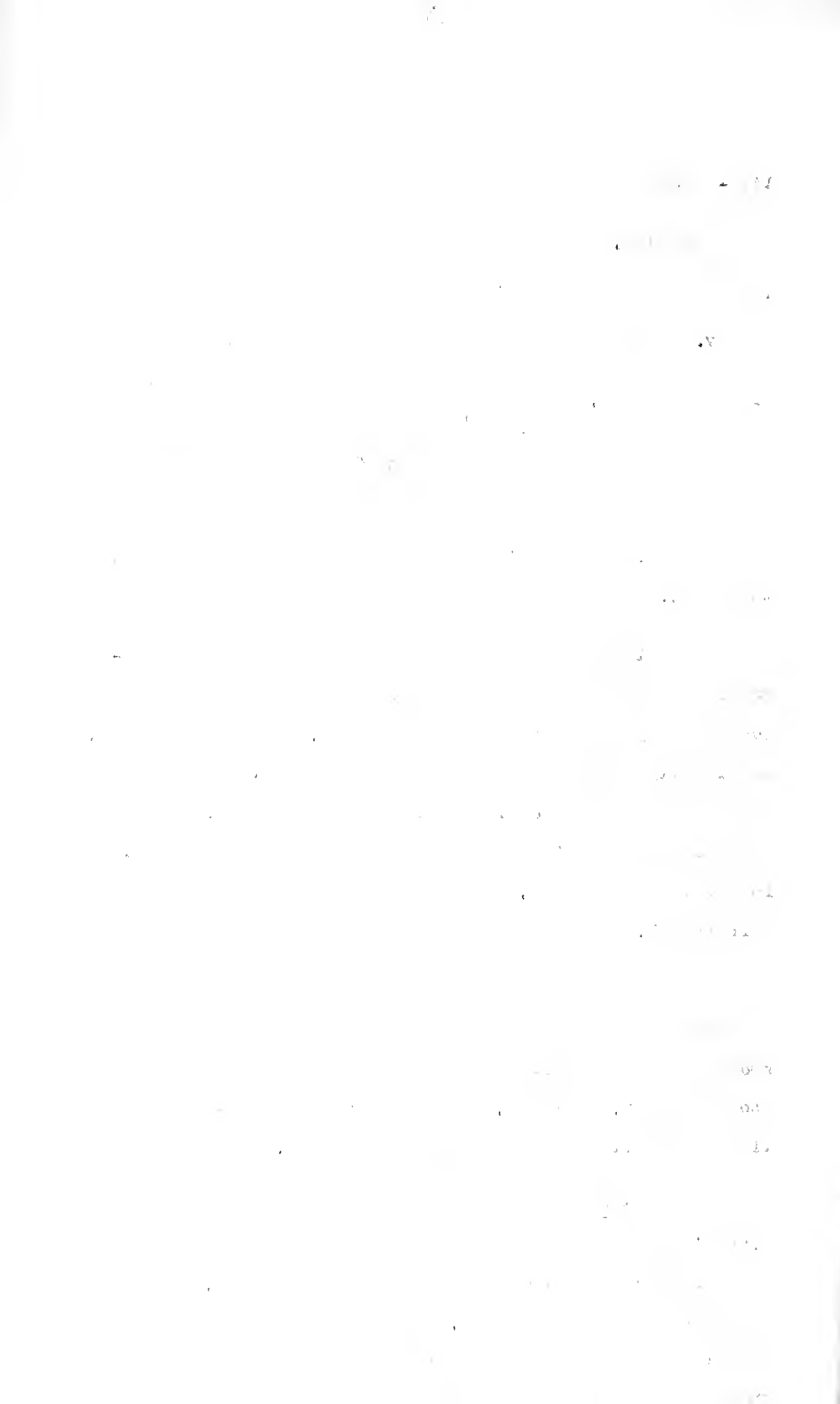
21914.655

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries claimed to have been sustained by him by reason of defendant, through its agent, negligently lifting the Erie Street bridge over the north branch of the Chicago River while he was upon it. At the close of plaintiff's evidence there was a directed verdict in favor of defendant, to reverse which plaintiff prosecutes this appeal.

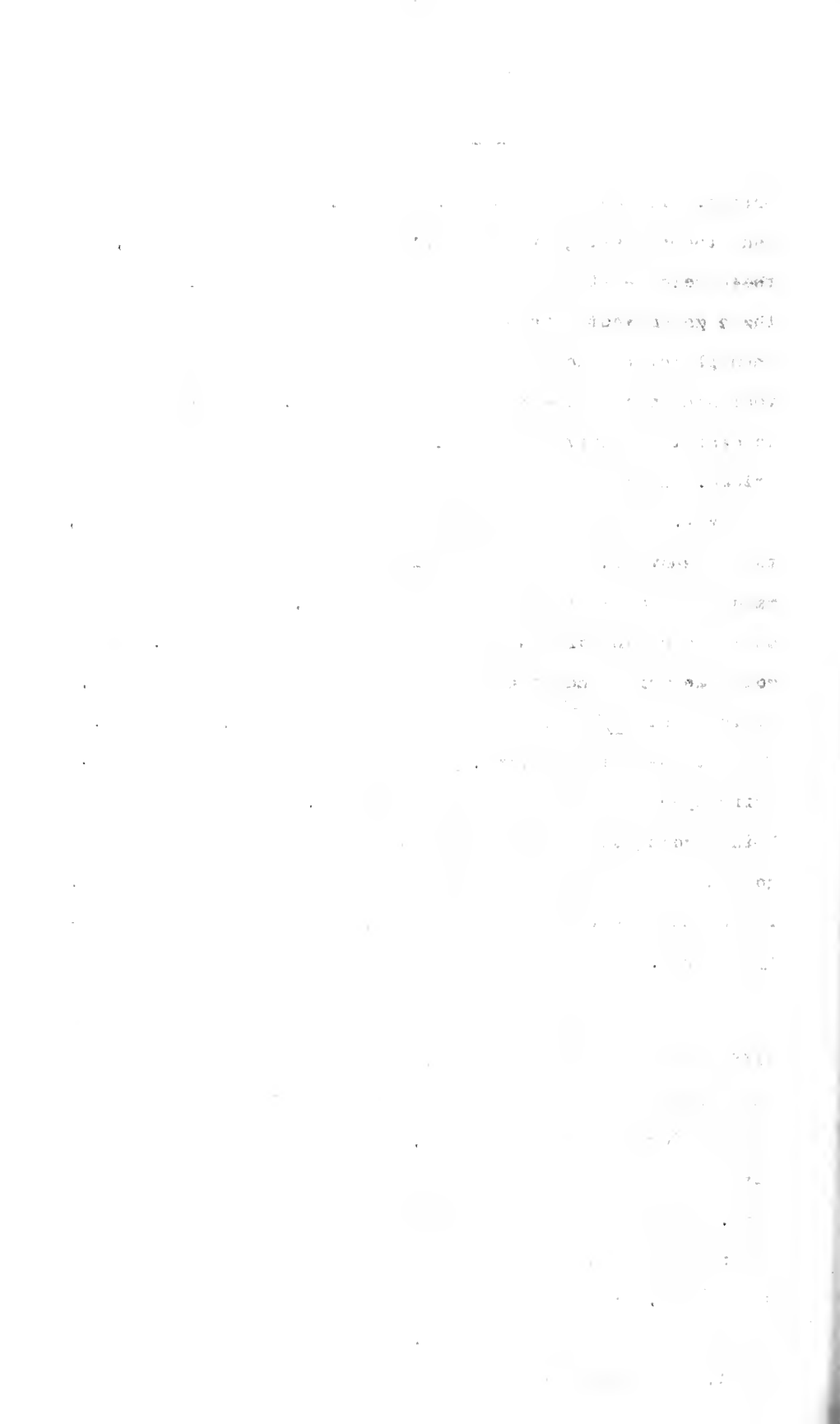
The court directed the verdict apparently on the theory that the evidence offered on behalf of plaintiff showed that the injuries suffered by plaintiff were brought about in part, at least, by his own negligence - that plaintiff was guilty of contributory negligence.

The evidence tends to show that between 7:30 and 8:00 o'clock on the morning of November 29, 1915, plaintiff who was driving an ice wagon east on Erie street, a short distance west of the bridge, stopped his team because the traffic ahead of him was blocked by another team that was unable to proceed by reason of the slipperiness of the



bridge. It was a cold winter morning. There were a great many teams passing over the bridge from both directions, those going east were on the south side of the bridge and those going west were on the north side of the bridge. When plaintiff stopped his team there was at least one other team and wagon between him and the bridge. He went forward to assist the driver of the team that was stalled on the bridge. He spoke to the bridge tender and secured from him a shovel. He then went nearby and got some cinders or ashes, took a shovelful out on the bridge and spread them under the wagon and horse or team that was stalled, and then helped push the wagon forward to enable the team to proceed. He got some more cinders and was spreading them on the bridge, facing east at ^{the} time, when he heard someone say, "LOOK Out!" He felt the bridge moving. It was of the single leaf jack-knife type and opened from the west end. When he saw the bridge going up he ran toward the west end of it and when he got there that end of it was ten or fifteen feet in the air. In an endeavor to save himself he jumped off and was severely injured.

The evidence also tends to show that while plaintiff was in the act of spreading cinders on the bridge a tug came along in the river and blew its whistle for a number of minutes for the bridge to open, and that signal bells were also ringing to warn people that the bridge was about to open. Whether this boat whistle and the bells rang before plaintiff went upon the bridge and continued thereafter to be sounded, or whether the whistle blew and the bells rang after he went upon the bridge is not clear. But in either event, we think it immaterial so far as the question before



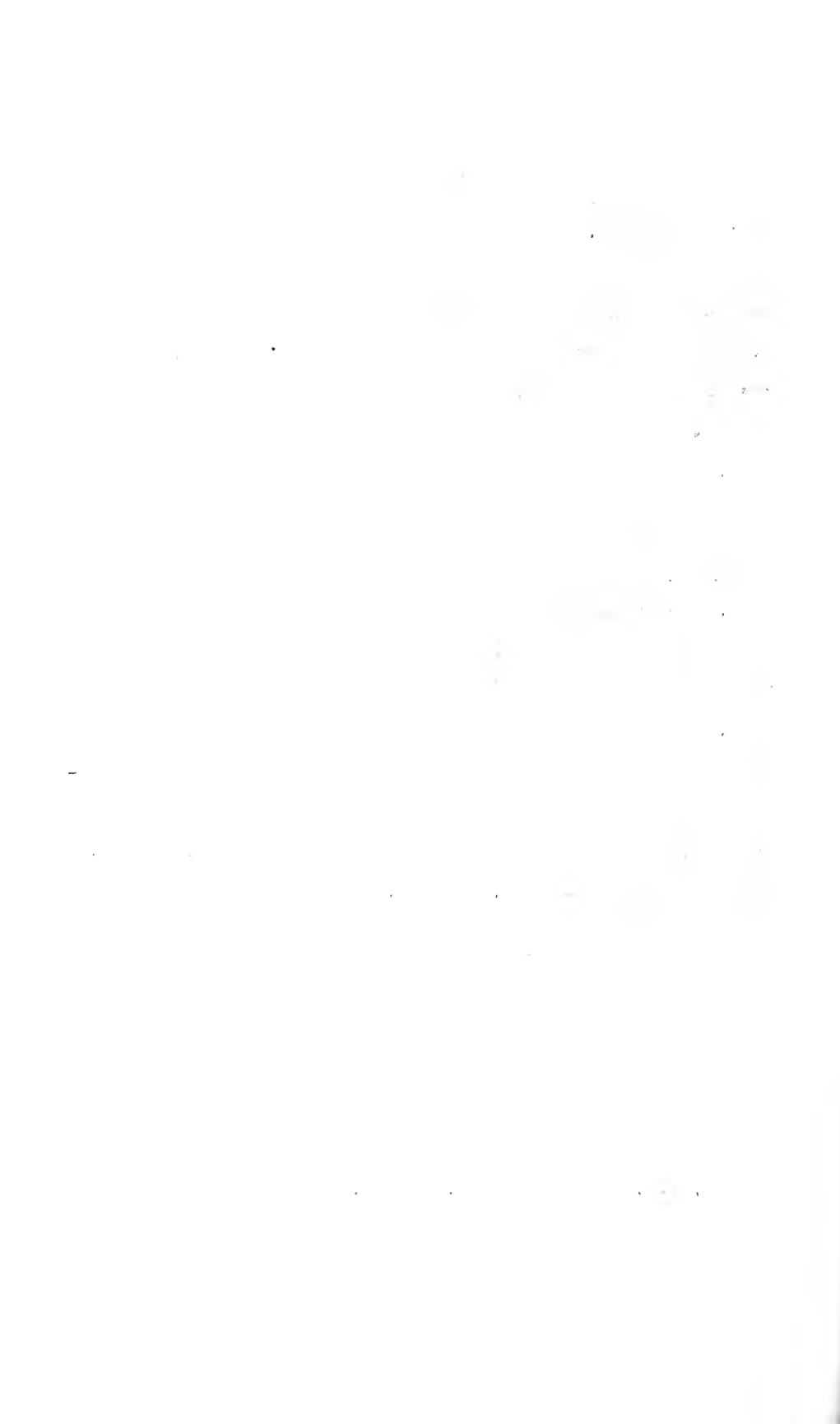
us is concerned. The evidence also showed that plaintiff had a cap pulled down over his ears and that consequently he could not hear as distinctly as he otherwise might. It further appears from the evidence that the bridgetender saw him on the bridge, and there is further evidence that the bridgetender warned everybody that the bridge was about to open.

In these circumstances we think plaintiff made out a prima facie case and it should have been submitted to the jury. The bridgetender knew the plaintiff was on the bridge spreading ashes on the icy pavement of the bridge with his face turned to the east and with a cap pulled down over his ears. We think it clear that all reasonable minds might not reach the conclusion that plaintiff was guilty of negligence in failing to get off the bridge before it was raised and that the court erred in directing the verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

The judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.



154 - 25408

PHILIP HECHT, by David P. Schultz,)
his duly authorized agent in this)
behalf,)

Appellee,)

v.)

SAMUEL FELD,)

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

219 T. A. 655

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

This was an action of forcible detainer for the possession of a hallway in a building known as 208 South State Street, Chicago. After a jury had been empaneled and sworn, the attorney for the plaintiff and the attorney for the defendant each made an opening statement of the case to the jury as to what the evidence would show. At the close of the opening statement for defendant counsel for plaintiff moved the court to instruct the jury to return a verdict for the plaintiff, apparently on the ground that the statement did not show any legal defense. The court granted the motion and instructed the jury, and a verdict was accordingly returned. The court said, "Gentlemen of the Jury, on the statement of counsel for defendant it appears that there is no defense to the action, and you will sign a verdict for the plaintiff." It is quite apparent that the trial judge's attention was not called to the case of Pietsch v. Pietsch, 245 Ill. 454. That case holds that a verdict can not be directed on the opening statements of counsel.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P. J. and THOMSON, J. CONCUR.

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62 - 25305

A. L. CLARK & COMPANY, INC.,
a corporation,

Plaintiff in Error,

v.

CHARLES LEVY COMPANY,
a corporation,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

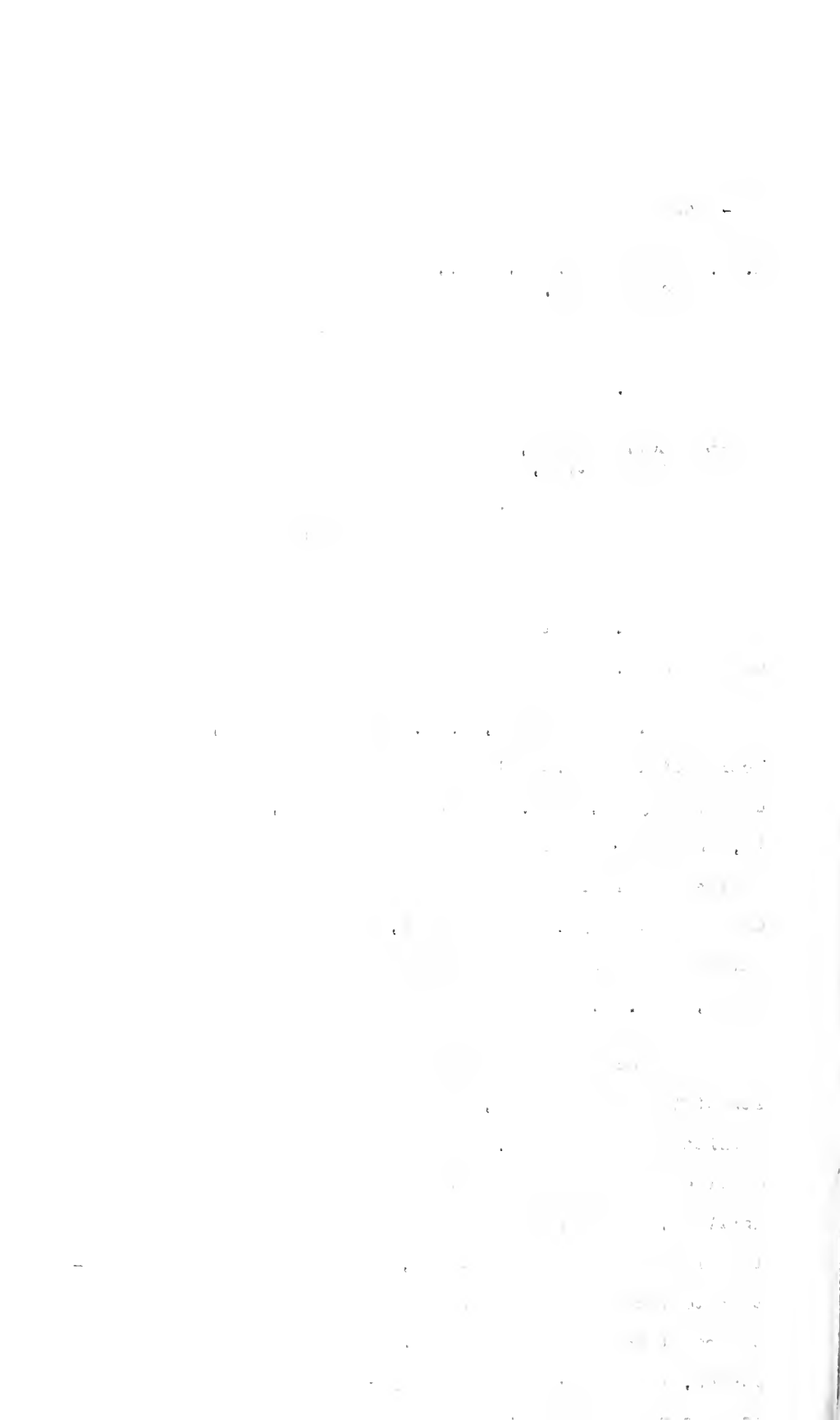
OF CHICAGO.

219 L.A. 606

MR. JUSTICE THOMSON delivered the opinion
of the court.

The plaintiff, A. L. Clark & Company, began this action of the fourth class in the Municipal Court of Chicago on February 20, 1919. Summons was served, returnable March 10, and on that date the defendant filed its appearance and secured an order extending the time for filing its affidavit of merits 10 days. On March 21, judgment by default was entered in favor of the plaintiff for the amount of its claim, \$498.75.

During the forenoon of that day the defendant filed its affidavit of merits, without obtaining any order of court, permitting it to do so. This was the day after the extension of time for filing the affidavit of merits had expired. On April 23, which was 38 days after the judgment in favor of the plaintiff had been entered, the defendant filed its motion to vacate and set aside the judgment and two days later the court entered an order providing that "said judgment be opened, that leave be and hereby is given to the defendant to appear and make defense herein, and that a trial of this



case he had, notwithstanding said judgment, that said judgment stand as security and that execution herein be stayed until the further order of this court." The defendant prayed an appeal from that order, which the court refused to grant and thereupon, this writ of error was sued out of this court, and thereby the plaintiff seeks to reverse the order referred to.

Clearly the trial court erred in disturbing this judgment. Section 21 of the Municipal Court Act, (J. & A. Par. 3333) provides that if no motion is made to vacate, set aside or modify a judgment of that court within 30 days after it is entered, such judgment "shall not be vacated, set aside or modified excepting on appeal, or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same which would be sufficient to cause the same to be vacated, set aside or modified by bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by a writ of error coram nobis, may be corrected by motion, or the judgment may be set aside in the manner provided bylaw for similar cases in the circuit court." The petition filed in the case at bar did not seek to correct an error in fact but sought the vacating of the judgment by reason of the negligence of counsel. This is shown by the petition itself, which states that when the defendant was given an extension of ten days, from March 10, for the filing of its affidavit of merits, counsel for the defendant inadvertently noted the last day for the filing of the affidavit of merits, in his lawyer's diary, under the date of March 21 instead of March 20, and neither the defendant nor

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is equivalent to the problem of finding the minimum of a certain functional. This functional is defined as follows:

$$J(u) = \int_{\Omega} |\nabla u|^2 dx + \int_{\Omega} u^2 dx - \int_{\Omega} f u dx$$

where Ω is a bounded domain in \mathbb{R}^n , ∇u is the gradient of u , and f is a given function. The minimum of $J(u)$ is attained at a function u which satisfies the following boundary value problem:

$$\begin{aligned} \Delta u + u &= f & \text{in } \Omega \\ u &= 0 & \text{on } \partial\Omega \end{aligned}$$

The second part of the paper is devoted to the construction of a numerical algorithm for the solution of the above boundary value problem. The algorithm is based on the finite element method. The domain Ω is discretized by a triangular mesh. The function u is approximated by a piecewise linear function u_h defined on the mesh. The minimum of $J(u_h)$ is found by the method of steepest descent. The error of the approximation is estimated by the following inequality:

$$\|u - u_h\|_{H^1(\Omega)} \leq C h^{\frac{1}{2}}$$

where h is the maximum size of the triangles in the mesh, and C is a constant depending on the domain Ω and the function f .

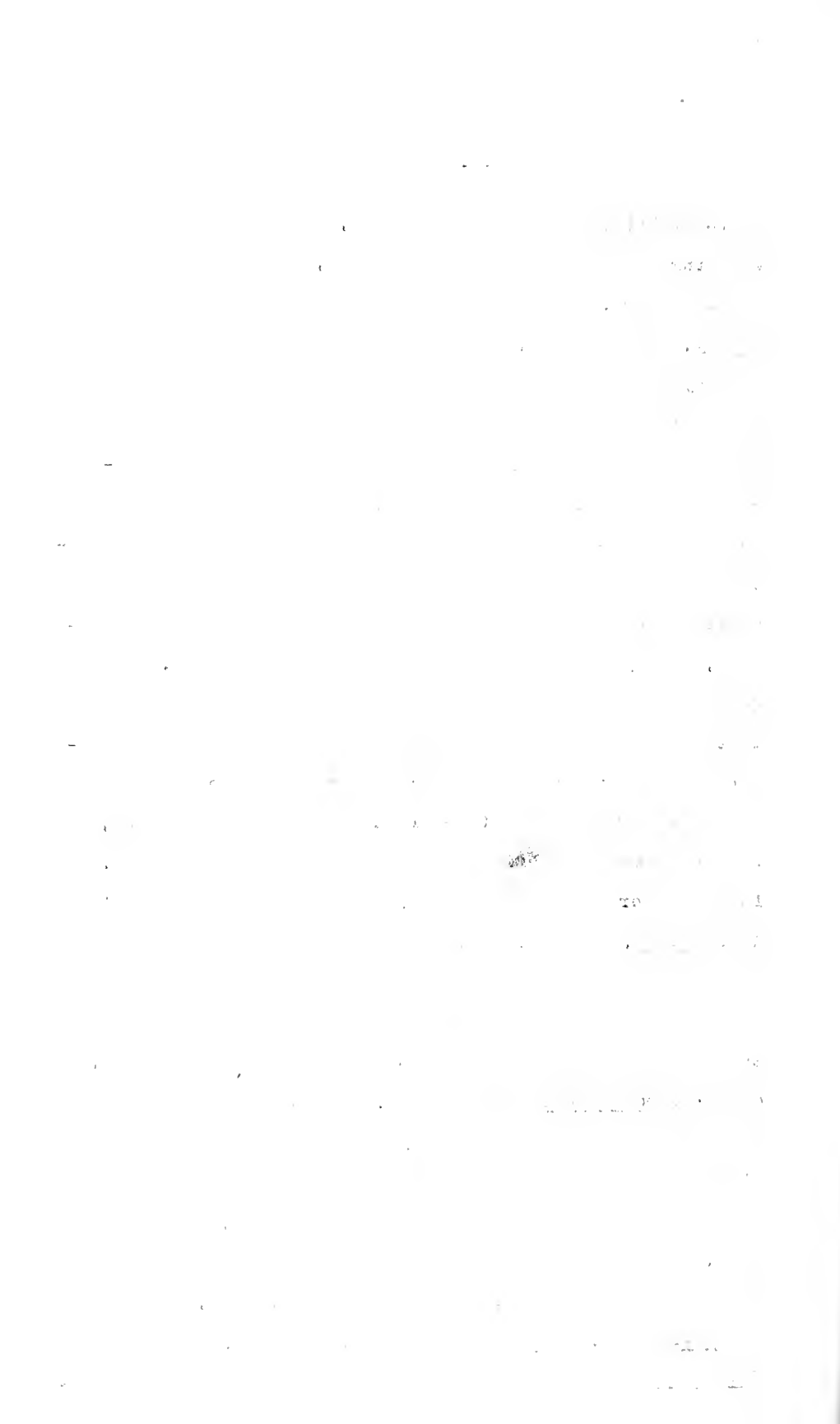
The third part of the paper is devoted to the numerical results. The results show that the algorithm is stable and convergent. The error of the approximation is of the order of $h^{\frac{1}{2}}$. The results are compared with the results of other methods. The results show that the proposed method is more efficient than the other methods. The results are also compared with the results of the analytical solution. The results show that the proposed method is more accurate than the analytical solution.

its counsel learned of the entering of the judgment until a deputy from the Municipal Court appeared at the defendant's place of business, in connection with proceedings following the judgment and more than thirty days after the judgment was entered. It will be seen that defendant's petition to be successful must have set forth grounds for vacating the judgment, "which would be sufficient to cause the same to be vacated, set aside or modified by bill in equity." It, however, set forth no such grounds for it was based entirely upon negligence. As this court has recently had occasion to say, the law is well settled that a judgment in the Municipal Court will not be set aside after the time fixed by the statute for so doing, unless, it is made to appear, not only that the petitioning defendant had a good and meritorious defense but also that the judgment was in no manner caused by any lack of diligence on his part. American Surety Company of N.Y. v. Bliss, 214 Ill. App. 463. Therefore, even if we did assume that the defendant in the case at bar had a meritorious defense to the action, as contended, nevertheless the judgment having been entered by reason of the defendant's negligence in failing to file its affidavit of merits within the time allowed, the judgment should not have been disturbed. It is contended that the negligence of counsel for the defendant should not be imputed to the client. Such a contention is without merit.

It is urged by the defendant that the order in question was not a final order. That order directed that the judgment stand as security but that execution be stayed and the judgment be opened and leave be given the defendant to appear and defend, notwithstanding the judgment. Both the parties,



in their briefs filed in this court, treat the order as one vacating the judgment and properly so, for that is what it was in effect. As pointed out in City of Park Ridge v. Murphy, 258 Ill. 365, "Where a default is set aside and a money judgment is vacated, the usual and proper practice is to allow the judgment recovered to stand as a security for the payment of any amount that may ultimately be recovered on a retrial of the case, and any liens that have been acquired under the judgment are retained until the final determination of the merits of the controversy." In that case a motion was made to set aside a default and vacate a judgment, nearly a year after the judgment was entered. The court held that there was no final judgment involved and that the order there in question was not appealable and observed that the motion was not an independent original action "but was simply a step taken in the original proceeding, which is authorized by section 89 of the Practice Act of 1907." In the later case of Gramer v. Illinois Commercial Men's Association, 260 Ill. 516, there was likewise involved an appeal from an order vacating a default and judgment on motion made after the judgment term had expired. The court held that the motion appealed from was one substituted for the writ of error caram nobis (under sec. 89) intended to allege errors in fact and that unquestionably the action of the court in allowing the motion and vacating the judgment was based on a finding that there were such errors, and that, such being the case, the law allowed an appeal from the order as in any other case of final judgment, citing Mitchell v. King, 137 Ill. 452 and Domitski v. American Linseed Co., 221 Ill. 161. In the Gramer case the court said that if a court sets aside or va-



cates a judgment otherwise than under the motion substituted for the writ (coram nobis) the order is interlocutory and the parties must await a final judgment, from which an appeal or writ of error will lie, citing Walker v. Oliver, 63 Ill. 199 and City of Park Ridge v. Murphy, 258 Ill. 365. The court then observes that in the Walker case, "the judgment (vacated) was void for want of jurisdiction apparent on the face of the record as a matter of law, and the motion to set it aside was for error of law and not for error of fact." The court then says, "So, also, in City of Park Ridge v. Murphy, supra, a reason for vacating the judgment was want of proper service of notice on Murphy or his agents, which showed a want of jurisdiction." The writer of the opinion in the City of Park Ridge case, dissented from the decision of the majority of the court in the Cramer case. In the case of Gallay v. Mathis, 195 Ill. App. 170, a judgment of the Municipal Court, was vacated after the expiration of 30 days from its date on a motion or petition in the nature of a bill in equity. In that case this court said, "Our courts have held such petition to be in the nature of a separate suit, and that in such a proceeding an order setting aside a judgment is reviewable by appeal or writ of error," citing the Cramer case, supra, and Barnes v. C.C. Ry. Co. 185 Ill. App. 148. The latter case cited the Cramer case and followed it, holding that an order vacating a judgment pursuant to a motion made under the provisions of section 89 of the Practice Act, was a final and appealable order. Again in the case of Doyle v. Fallows, 207 Ill. App. 5, this court treated an order vacating a judgment of the Municipal Court, more than 30 days after the judgment was entered, as an appealable order. The court there held that the petition filed, failed to disclose such grounds

for the vacation of the judgment as would be sufficient to maintain a bill in equity under the same circumstances.

We therefore hold that under the law of this State, as laid down in the above decisions, the order sought to be reversed by this writ of error was a final order and subject to review in this court by writ of error and we further hold, for the reasons heretofore referred to, that the Municipal court erred in allowing the motion and entering the order opening up the judgment, and therefore that order is reversed.

REVERSED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

74 - 25319

JOHN E. SHATFORD,

Appellant,

v.

MILES J. VOTAVA,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

219^{OF CHICAGO.} 1.A. 656

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action on a check given him by the defendant, in the sum of \$500, which had not been paid. The trial court made a finding for the defendant and entered judgment accordingly, to reverse which the plaintiff has perfected this appeal.

By his affidavit of merits the defendant set up want of consideration and failure of consideration. The plaintiff contends that while both of these defenses may be interposed in the same case, they must be separately pleaded, and he contends that the court erred in overruling his motion to strike the amended affidavit of merits from the files because it contained these two inconsistent defenses. This point is not tenable, as it might be if this action were not in the Municipal Court and the defenses referred to had been incorporated in the same plea. Such defenses as these may be incorporated, as these are, in separate paragraphs of an affidavit of merits, filed in a fourth class action in the Municipal Court.

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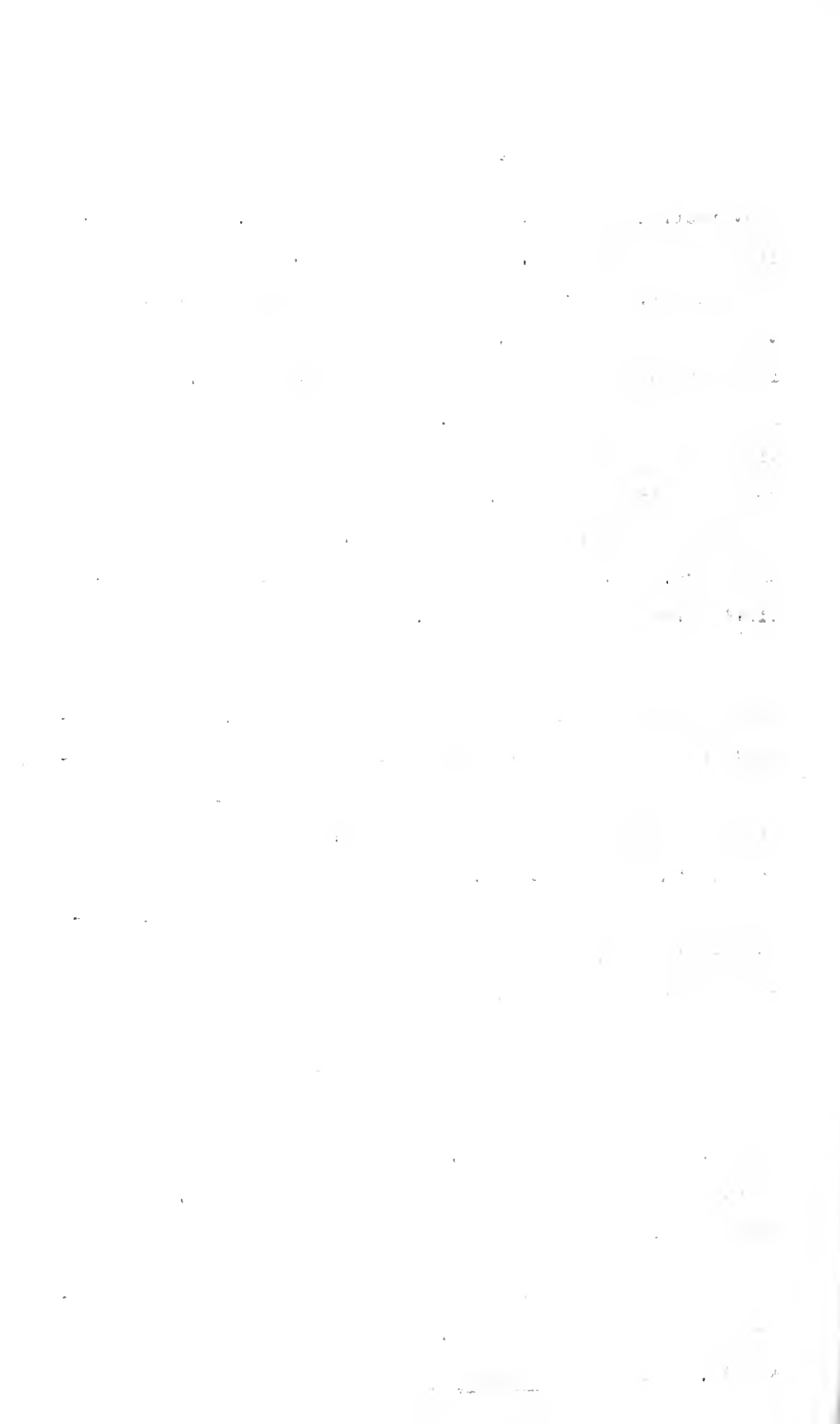
The defendant contends that this case presents a promise between two persons with reference to forbearance between two others and that therefore there was no consideration for the giving of the check.

The plaintiff introduced the check and then rested. The defendant testified that he was an officer of the Hibner Oil Company which had given the Great Northern Refining Company several promissory notes, aggregating \$6,500 in amount. The plaintiff was president of the latter company and owned 92% of its stock. There seem to have been three notes, the second falling due three days after the first and the third, three days later. On the day the first note fell due, the defendant saw the plaintiff and told him the Hibner Oil Company was unable to pay it. The Michigan Avenue Trust Company held the notes when they fell due. The defendant told the plaintiff he had requested the Bank to accept new notes in payment of the old ones and the Bank had said it would do so if that was satisfactory to the Great Northern Refining Company, - that the Bank would discount the new notes if the Great Northern Refining Company would accept them from the Hibner Oil Company. He further testified that the plaintiff refused to accept new notes but said he would confess judgment that day on the note then due; that he (the defendant) told the plaintiff that meant ruin to the Hibner Oil Company and "that the only way out of it was to have the notes renewed;" that they (the Hibner Oil Company) were willing to give them (the Great Northern Refining Company) the discount they had offered the Bank; that the plaintiff first said that the notes could not be extended for any consideration smaller than a thousand dollars but after some

conversation "I received an ultimatum from Mr. Shatford unless I made that \$500, the first note would go to confession of judgment, and the others would follow if not paid"; that the defendant then said, "My company would not allow my paying this much out and the only way it can be done, if I give you my personal check for it." This was agreeable to the plaintiff and the defendant asked the plaintiff if he wanted the check drawn to his order or that of the company and the plaintiff said it made no difference, that he owned 92% of the stock, that the defendant better make it out to plaintiff's order and that was done.

The Great Northern Refining Company did forbear confessing judgment on the notes that were due, and new judgment notes were given in lieu of them at the time the defendant gave the plaintiff the check here sued upon. Some six weeks or two months later judgment was confessed on the new notes. The defendant contends that there was no consideration given by the plaintiff to the defendant for the check, inasmuch as the Great Northern Refining Company never promised to forbear confessing judgment on the notes at the time such forbearance was requested by the defendant when he said his company would be ruined if judgment was then taken and that the mere fact that the Great Northern Refining Company did forbear to confess judgment, unless it was preceded by a promise from them as a consideration for the check, is not sufficient.

This contention is not sound. An agreement to forbear is a good consideration. Morgan v. Park National Bank, 44 Ill. App. 582; Beltine Chemical & Manufacturing Co. v.

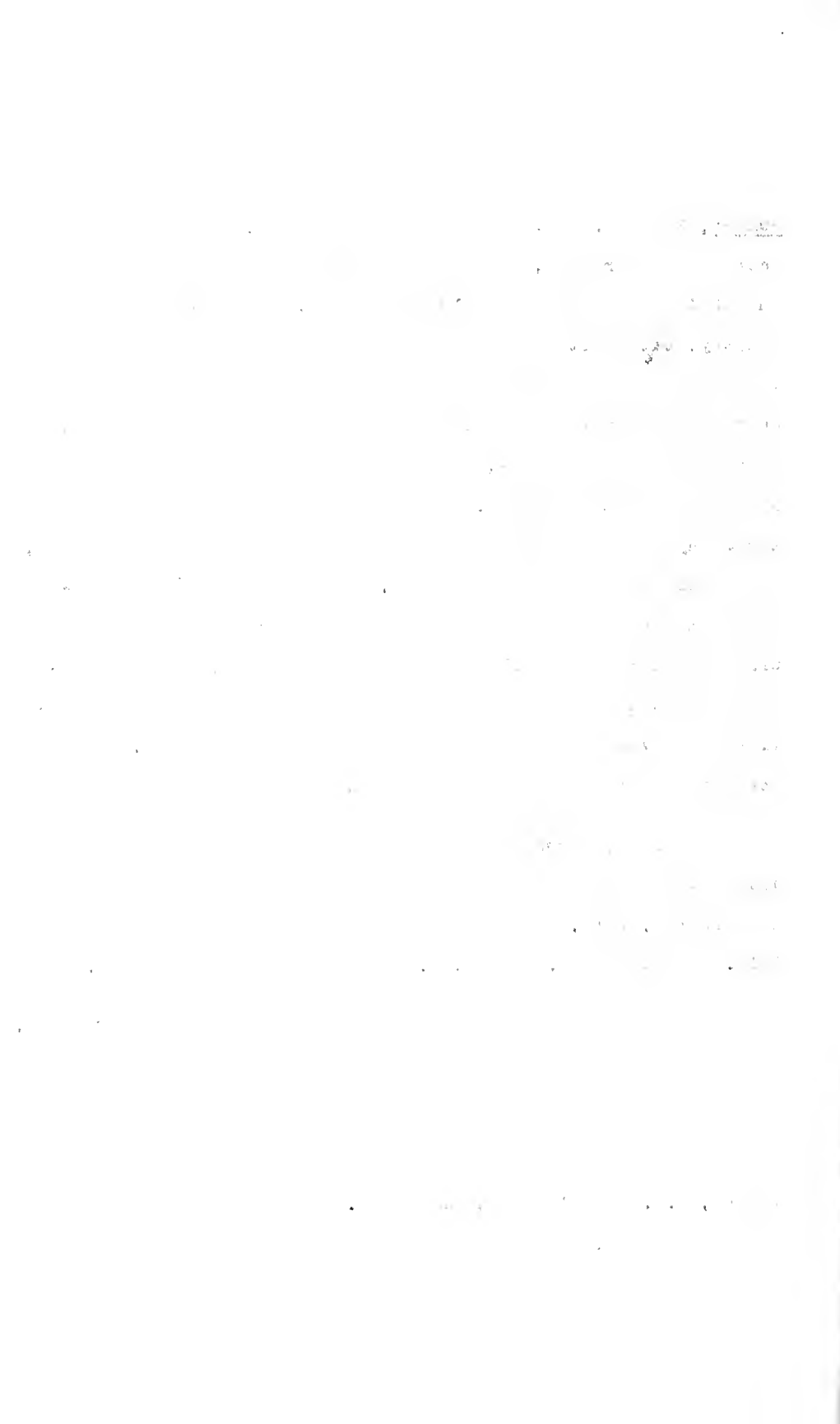


Zulfer, 152 Ill. App. 308. It can make no difference that the notes which were due, were the property of the Refining Company and that the promise to forbear was made, not by the Refining Company, but by its president and that the check was drawn to the order of the latter. It is clear that the plaintiff possessed the requisite authority to make the promise to forbear, on behalf of his company, and it is not contended that such promise was not fulfilled. The defendant shows by his own testimony that it meant a great deal to his company, the debtor, and to him as one of its officers, if confession on its judgment notes could be prevented at the time they fell due. The plaintiff agreed to forbear taking the action that was threatened in consideration of \$500 and accordingly the check in question was given and the threatened action was prevented. There was good consideration for the check.

The judgment of the Municipal Court is reversed and judgment is entered here for \$500 with interest at 5% from September 5, 1918, the due date of the instrument sued upon (Ill. Statutes chap. 74 sec. 2.) or a total amount of \$554.16.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



JENNIE J. LEMON, and HARRY
C. LEMON,

Plaintiffs in Error,

v.

JEANNETTE LEYITZE,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

2191.A. 656

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs, owners of a bungalow, brought this action against the defendant, their tenant, seeking to recover \$126.97, the value of certain house furnishings they claimed she had unlawfully appropriated and certain lumber and fire wood they claimed she had improperly used. The issues were submitted to a jury and they found for the plaintiff and assessed his damages at the sum of one dollar. Plaintiffs moved for a new trial, claiming that the evidence showed that they were entitled to substantial damages. The motion was overruled and judgment entered on the verdict. To reverse the judgment, the plaintiffs have sued out this writ of error.

The only question involved here is whether the evidence supports the verdict and judgment. The bill of exceptions contained in the record, consists of a statement of facts which is not certified as a statement of all the evidence submitted in the trial court. In that state of the record this court is bound to assume that sufficient evidence was submitted to support the verdict and warrant the trial court in overruling the motion for a new trial and entering

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judgment on the verdict. Moreover, we have examined the statement of facts as contained in the record, and in our opinion it supports the verdict.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

THE JOURNAL OF THE

ROYAL SOCIETY OF MEDICINE

VOLUME 10, PART 1, 1917

1917

1917

99 - 25351

LEWIS HOHMANN,

Appellant.

v.

CHRISTOPHER MAMER, ANDREW
MCANSH, BYRON A. MCANSH,
CHRISTOPHER MAMER, JR., and
CHICAGO RIVER TRANSFER COM-
PANY, a corporation.

Appellee.

APPEAL FROM

SUPERIOR COURT,

COLE COUNTY.

2191A 656

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an appeal by the complainant Hohmann,
from a decree dismissing his bill for an accounting, for
want of equity.

The bill alleged that on November 20, 1913, the
complainant, and the defendants, Christopher Mamer and
Andrew McAnsh, entered into a partnership agreement in
writing, whereby they agreed to engage in transporting
garbage on the Chicago River, under the name of "Chicago
River Transfer Company". Each was to contribute an equal
share of the necessary funds, and share in the profits in
accordance with the amount of funds so contributed. The
contract provided that it was to remain in full force for
the period of one year "unless otherwise mutually dissolved."
The bill further alleged that after the execution of this con-
tract, the partnership made a contract with the City of Chicago
for the transportation of its garbage from certain loading
points to a reduction plant and proceeded in its performance
with ear

with certain boats and scows which the partnership acquired. \$2000 having been put into the business by the three partners in equal shares, and that the partnership also entered into a contract with the Royal Transit Company for the purchase of other boats and barges.

It was further alleged that early in 1917 the partners formed a corporation under the same name as the partnership, with capital stock amounting to \$25,000, in shares of \$100 each, and that the boats and scows of the partnership were turned into the corporation at a valuation of \$15,000 and that certain shares were issued to the defendants, other than the members of the partnership, it being the intention that they were to hold them for the benefit of the partnership and for sale purposes, no money being paid for such stock by those defendants.

The bill alleged further that the formation of the corporation in no way changed the interest of the partners in the partnership business but was incidental thereto and that the corporation was never used to transact the business of the partners but that the business was transacted in the name of Wamer, in behalf of the partnership.

It was alleged further that Wamer claimed to be the sole owner of the garbage business of the partnership and was appropriating all the profits of the business to himself and that, although requested to do so, he refused to account to complainant for any of said profits; that each of the partners were entitled to a third of the profits of the business; that the "co-partnership business" had never been dissolved and no settlement of it had ever been made; that at the ter-



mination of the first year of the partnership, a partial payment was made to each partner but that no final settlement had ever been made; that the partnership had never expired but was still in existence and that complainant had repeatedly applied to Mamer for a final settlement which the latter had refused. The bill prayed that an account be taken of all the business of the partnership and the rights of the respective partners ascertained and that a decree be entered awarding complainant such share of the partnership business as it might be shown he was entitled to.

The evidence disclosed the partnership contract, the terms of which were as set forth in the bill of complaint, and also a contract between the partnership and the Royal Transit Company whereby the partnership engaged to buy certain boats and barges for which payments were to be made extending into the year 1918, which was beyond the year for which the partnership was organized.

The evidence further disclosed a contract between the partnership and the City of Chicago dated December 1, 1915, for the carrying of garbage from January 1, 1916 to December 31, 1916, and also a contract between Mamer, "assignee and sole surviving partner" of the partnership, and the City of Chicago, for the carrying of garbage from January 1, 1917 to December 31, 1917. This contract was made pursuant to a bid originally submitted by the partnership, which the contract set forth, had assigned all the rights of the partners to Mamer as surviving partner. There was a further contract between Mamer and the City of Chicago for the carry-

ing of garbage during the year 1918. Mamer testified that the City was slow in making its payments and that he individually engaged in carrying the garbage from January 1, 1917 to some time in July of that year, at which time his individual contract with the City for the carrying of the garbage for that year, was entered into, and that it was dated back to January 1, 1917.

The evidence further disclosed a contract between complainant Hohmann and the defendant McAnsh, as parties of the first part and Mamer, as party of the second part, under date of February 23, 1917, which recited the formation of the partnership and provided that, "it being the desire, purpose and intent, severally and jointly, to dissolve said co-partnership, said co-partnership is by these presents, hereby dissolved." This contract further recited that Hohmann and McAnsh, "in consideration of delivery to each, of \$2,000 paid up capital stock of the Chicago River Transfer Company, a corporation now being organized under the laws of Illinois, * * * do bargain, sell and deliver unto Mamer all right, title and interest we now have or may have in and to the copartnership known and described as the Chicago River Transfer Company, together with all right, title and interest we may have in any and all of the assets, good will and property of the said Chicago River Transfer Company". There were also introduced in evidence, receipts signed by McAnsh and Hohmann whereby each acknowledged receipt from Mamer of \$2,502.87, being "payment in full of my share of profits earned by Chicago River Transfer Company from January 1, 1916 up to and including date hereof (February 23, 1917) the said amount of \$2502.87



having been determined by an accounting and settlement having been had of the accounts of the said Chicago River Transfer Company this 23rd day of February, 1917".

The organization of the corporation was also disclosed by the evidence, the certificate of complete organization being filed in the Recorder's Office of Cook County on March 14, 1917. The stock was issued as follows: Mohmann, 20 shares; McAnsh, Sr., 20 shares and 30 shares; McAnsh, Jr., 15 shares; Mamer Jr., 15 shares; Mamer Sr., 100 shares. The evidence also disclosed minutes of the board of directors of the corporation approving and accepting certain property, "owned and offered by Christopher Mamer, Sr. in payment of stock subscribed for as follows, Mohmann 20 shares; McAnsh, Sr. 50 shares; McAnsh, Jr. 15 shares; Mamer Jr. 15 shares and Mamer Sr., 50 shares, "amounting in all to \$15,000". It is not clear from the record, but presumably the property thus turned in to the corporation by Mamer consisted of the boats and barges which had been assigned to him by the complainant Mohmann and the defendant McAnsh and which had been the property of the partnership.

The evidence further shows the accounting had of the partnership business at the time of the dissolution of the partnership. From this it appears that each of the partners originally advanced \$666.66 and that Mamer had advanced, from time to time, amounts aggregating \$14,857.88. This was duly repaid to him. The profits of the partnership amounted to \$7,535.62 at the time of the dissolution and this was divided equally between the three partners. It appears that the city paid nothing to the partnership under their contract until

February, 1917, when the partnership was dissolved.

There was some variation in the testimony as to just what was said by the parties at the time the corporation was organized and the dissolution agreement of February 23, 1917 was executed. Hohmann testified that the three partners had a conference at that time and that it was understood that the corporation was to "continue in business the same as under the copartnership;" that McAnsh said that "all our interests would be the same in the company as it was in the copartnership", and that McAnsh explained that the formation of the corporation was advisable so that they would get away from personal liability. Mamer testified that there was no mention made of any individual liability and that he did not hear any such remarks made by McAnsh but that the latter stated that it was silly for them to make a further contract with the City because it would not pay anything; that garbage had been hauled for eleven months and they had received nothing; that they did not know whether they would get any money; that Mamer had advanced all the money and it was not right for him to bear that burden and suggested that if they went further a corporation should be organized and that they should endeavor to get some of the passenger business between the Municipal Pier and Lincoln Park. The evidence shows that after the corporation was organized, some effort was made to acquire a small passenger steamer but the project fell through.

Hohmann further testified that after the organization of the corporation, the boats and barges transferred to it, continued in the garbage carrying service and the business was conducted as formerly, Mamer doing the inside work and Hohmann

the outside work; that in July 1917, McAnah sent for him and said Mamer had taken a contract from the city in his own name and if the corporation wanted it they would have to purchase it from him, that he (McAnah) did not like that action and that the contract belonged to the company, and that this started Hohmann to investigating. Mamer testified that two or three weeks after the execution of the dissolution agreement and the organization of the corporation and the issue of 20 shares of stock to Hohmann, the latter came to him and asked him to take his stock and give him \$2,000 and that he only saw Hohmann once after that when Hohmann came to him and wanted to sell him a saw. McAnah was not in the city at the time of the hearing and did not testify.

The bill alleged neither fraud nor failure of consideration and did not seek the setting aside of the agreement of February 23, 1917. If Mamer has used the barges and boats belonging to the corporation in the execution of a contract for the carrying of garbage which he individually entered into with the City of Chicago, he may be liable to account for such use to the corporation and Hohmann may have certain rights in that connection as a stockholder in the corporation. In our opinion the finding of the chancellor that the partnership had been dissolved and a final accounting of its business duly had by the partners, is fully supported by the evidence. In the absence of fraud or mistake such a dissolution and accounting is binding on the parties. Grouse v. McCandless, 121 Ill. App. 237; 220 Ill. 344; Richardson v. Gregory, 126 Ill. 166.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

ALPHONS H. GITS and REMI J. GITS,
copartners, doing business as
GITS BROTHERS MANUFACTURING CO.,
Plaintiffs in Error,

vs.

HENRY ULLRICH and ELMET F. McILROY,
Defendants in Error.

WRIT OF ERROR TO
CIRCUIT COURT OF
COOK COUNTY.

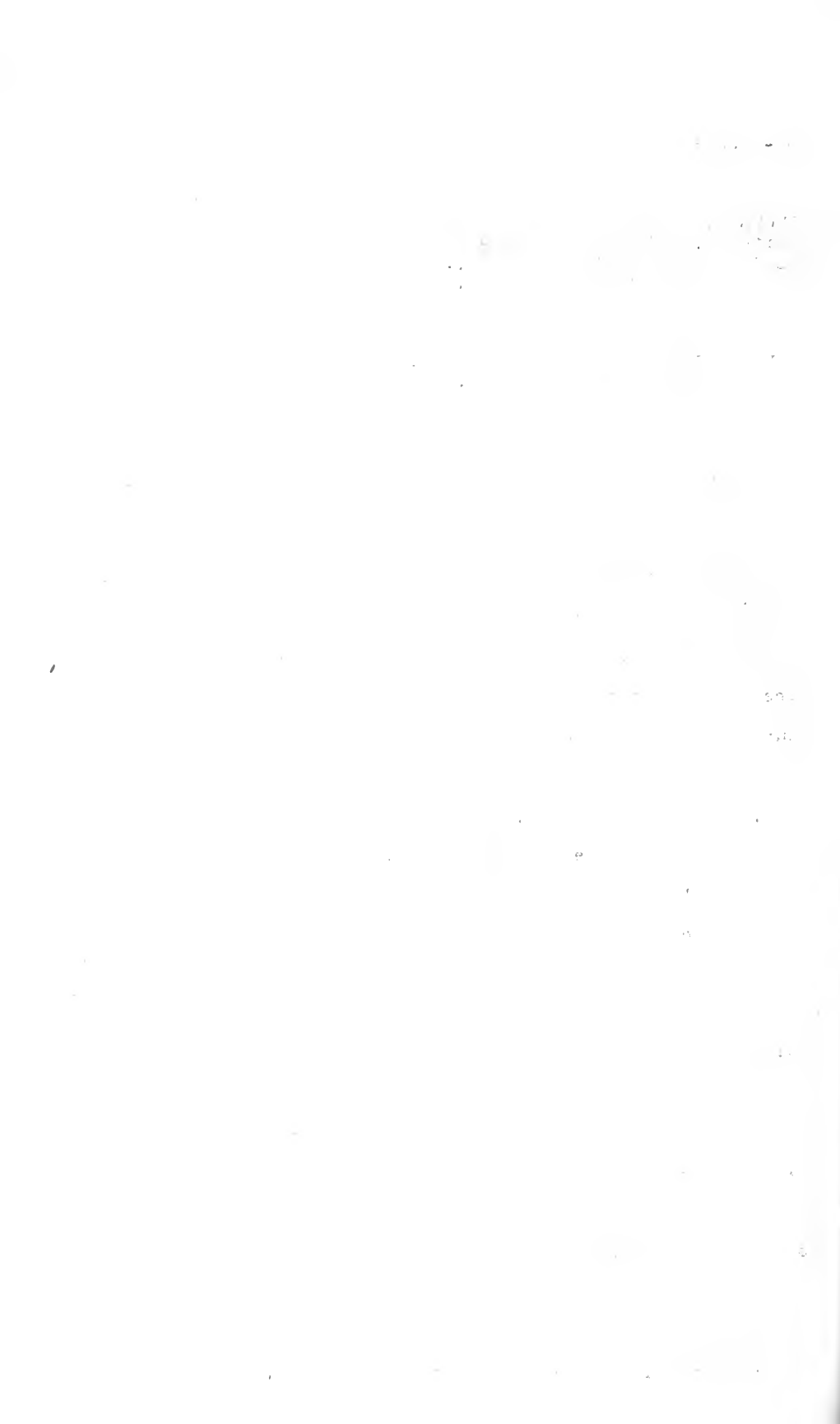
2191A 656

MR. JUSTICE THOMSON DELIVERED THE OPINION OF THE COURT.

The complainants, Gits Brothers Manufacturing Co., filed their bill in equity, seeking the rescission of a contract for the purchase of certain land, and the return of the money they had paid under the contract and the cancellation of certain notes they had executed in connection with the purchase, on the ground of fraud. Demurrers interposed by the defendants were sustained and the bill was dismissed as to the defendant McElroy, for want of equity, while complainants were given leave to amend as to the defendant Ullrich, but they elected to abide by their bill, whereupon the bill was dismissed as to that defendant also.

Complainants sued out a writ of error from the Supreme court on the theory that a freehold was involved. That court held otherwise and transferred the cause to this court.

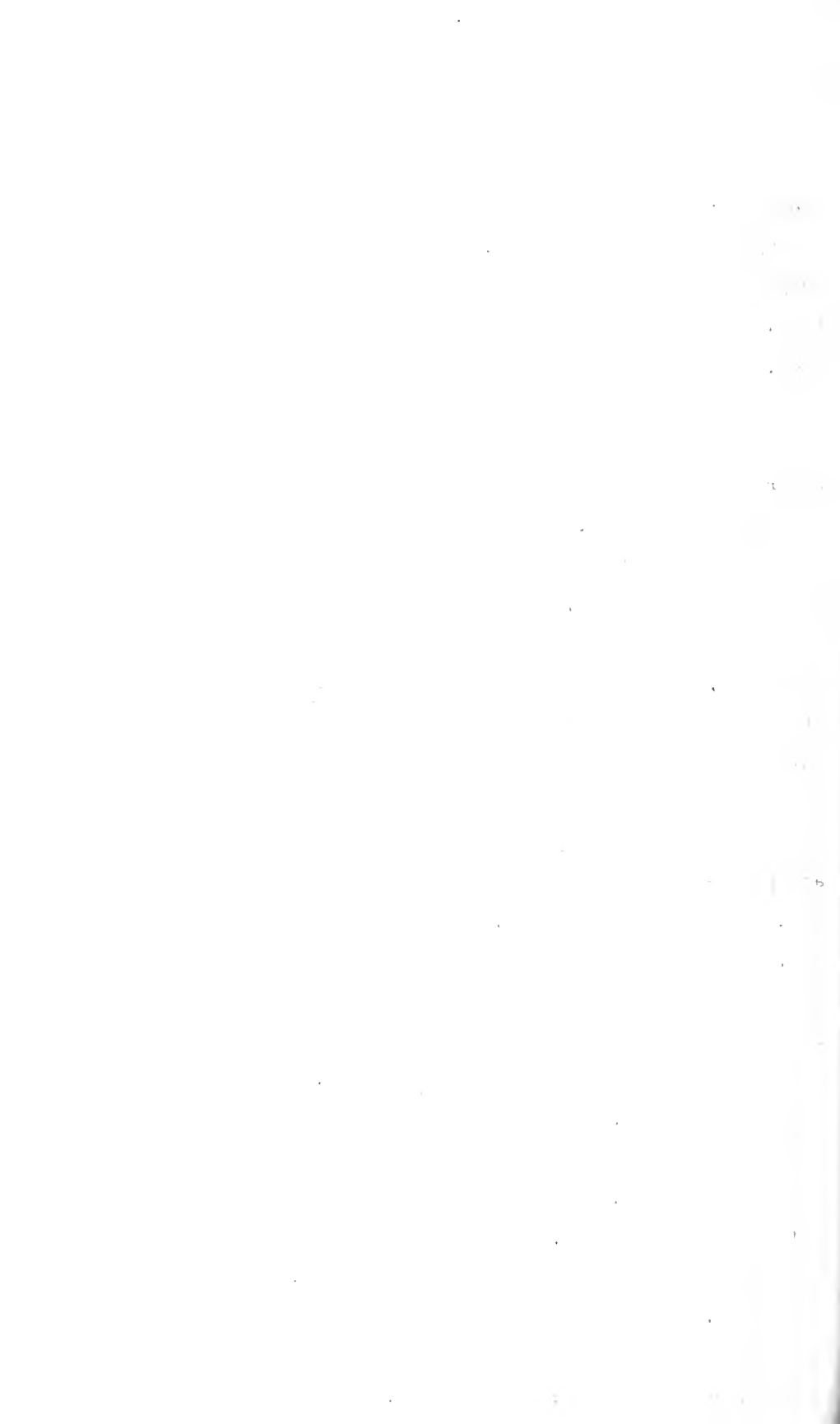
The complainants signed a written proposition to buy the land in question from Ullrich for \$8,850. of which \$5,000 was to be paid upon tender of a warranty deed and a Guarantee Policy and the remainder in monthly instalments of \$500 each. This proposition recited that complainants purchased the premises on condition that Ullrich "procure for us an agreement or a letter from the Peoples Gas Light & Coke Company, that they will furnish gas on or before May 1, 1918," and further



that he "procure for us an agreement or letter" from the City of Chicago for the furnishing of a water main, and further that he "negotiate with the Indiana Harbor Belt Railroad" for the extension of a switch track so as to serve the premises in question.

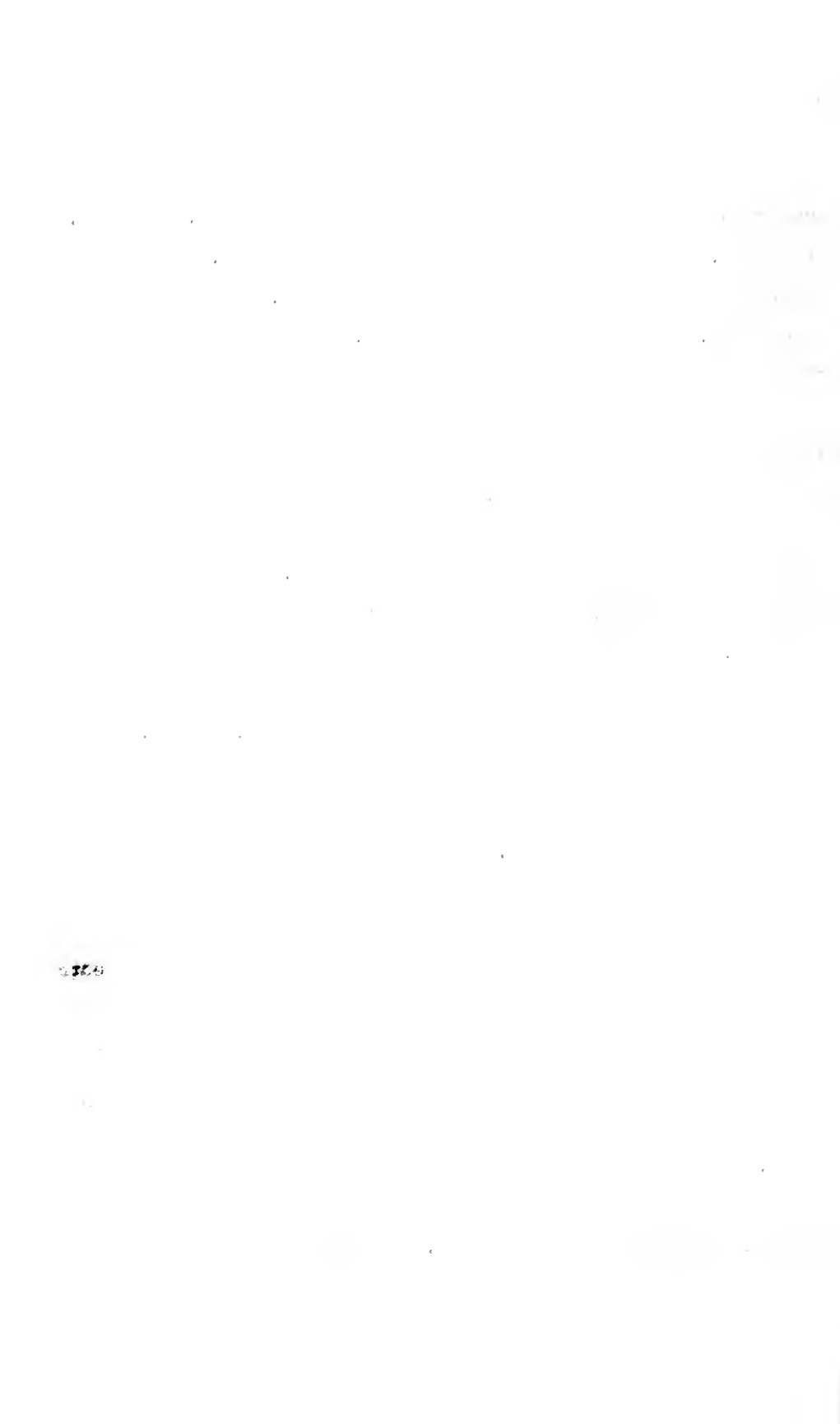
The complainants delivered the written proposition to Ullrich and at the same time paid him \$500 as earnest money. Later a deed to the property was duly delivered to complainants and accepted by them, at which time they discovered that the title had been in McElroy. At this time the complainants paid the further sum of \$4,500 and executed and delivered their notes for the balance. Ullrich did not furnish the desired assurances as to gas, water and switch track services, when the deal was closed, saying that it took time to accomplish those things, petitions had to be prepared and other formalities complied with, that he had been in the real estate business in Chicago for many years and his word was good and that if complainants would accept the deed and pay the cash required and execute and deliver their notes for the balance, he would procure contracts for gas, water and switch track service as soon as possible - certainly before the first note fell due. Complainants alleged in their bill that they relied on Ullrich's representations and paid their money and delivered their notes, but that he had never done as he agreed.

There were a number of causes of demurrer interposed by the defendants, but in our view of the case we need refer to but one or two of them. The question of whether a partnership existed between the defendants is immaterial. Assuming that there was, the demurrers were nevertheless properly sustained for the bill disclosed that complainants had a complete and adequate remedy at law. Furthermore, the bill fails to show



any fraud or misrepresentation on the part of Ullrich, assuming, of course, the truth of all allegations it contains. Fraud and misrepresentation, to warrant relief in equity, must have to do with facts, in existence or represented, as being in existence. The things relied upon by complainants in their bill were solely promises by Ullrich to do something in the future. Even if we assume that at the time Ullrich made the promises he had no intention of fulfilling them, there was not such fraud and misrepresentation as would give complainants the right to relief which they seek in equity. Miller v. Sutliff, 241 Ill. 521; Shamberg v. Stearns, 178 Ill. App. 587; Keithley v. Mutual Life Ins. Co., 271 Ill. 584. Adequate relief, however, could be had in a court of law, where they might sue for damages suffered by reason of Ullrich's breach. The damages suffered, if any, were easily capable of proof in an action at law in which respect the case at bar differs from the first case above cited.

In our opinion, the contract to purchase became fully executed when the deed was accepted by complainants and the money was paid and the notes delivered. Complainants had engaged to buy the land on certain conditions, namely, that Ullrich "procure" certain assurances for gas, water and switch track service. He had not done as agreed when the deed was tendered. The conditions which complainants had attached to their offer of purchase were conditions precedent. Under the terms of their proposal, complainants might have refused to accept the deed and pay their money or execute and deliver their notes, until the desired assurances were furnished, as stipulated, but they chose to waive those conditions and closed the transaction, relying on Ullrich's promise to procure the contracts for the services

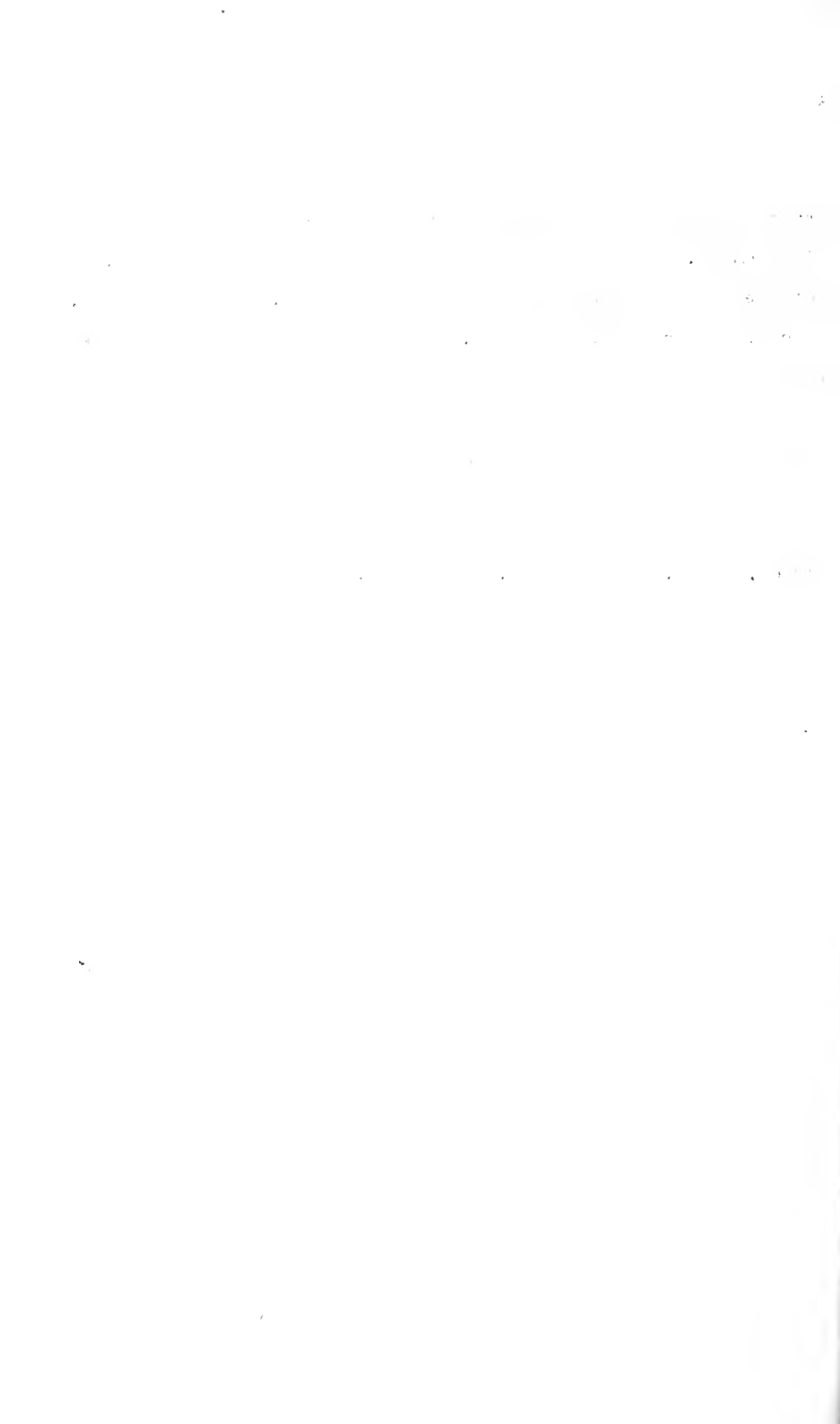


desired as soon as possible. If Ullrich has failed to fulfill his promise, the complainants have the usual remedies at law, but they may not file a bill in equity seeking, as they do here, a rescission of their contract, on the ground of fraud and misrepresentation.

We find no error in the record and therefore the decree of the Circuit court is affirmed.

AFFIRMED.

Taylor, F. J., and O'Connor, J., concur.



127- 25381.

CHARLES F. COLCORD,

VS.

FREDRICK H. BARTLETT & Co.,

PLAINTIFFS.

APPEAL FROM

THE DISTRICT COURT

OF COOK COUNTY,

21914.657

MR. JUSTICE FROBON delivered the opinion of the court.

The plaintiff, Colcord, brought this action for the conversion of certain property which he claimed had been destroyed by and carried away with the consent of the defendant. At the close of the plaintiff's evidence the court gave the jury a peremptory instruction to find for the defendant. Following that verdict, the court entered judgment for the costs against the plaintiff, to reverse which he has perfected this appeal.

Certain land was leased by the Pullman Land Association, owner, to one Gwathmey, as tenant. Subsequently Colcord acquired the rights of Gwathmey, buying the buildings which had been erected, and later he took two succeeding sets of leases on the property (in two parcels) from the Land Association, the last ones expiring February 19, 1917. The property contained certain fencing consisting of posts and wire and an old building which had been repaired and improved by the different tenants. There were also certain farming out-houses. There was some farm machinery on the property.

The leases to the plaintiff contained his agreement not to "underlet said premises or any part thereof, or assign this lease without the written assent", of the landlord. By

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the terms of the leases the landlord reserved "the right to enter upon the premises for the purposes of making any kind of use they may desire, at any time during the term of this lease, and in case of such entry the rental of the number of acres so used by the parties of the first part shall be deducted," in which event the plaintiff tenant agreed he would "make no claim whatsoever for loss of crops, fertilizing of the land, or any other claim," against the landlord.

The Pullman Land Association subsequently conveyed the land by warranty deed to the Chicago Title & Trust Company, which held it in trust under an agreement with Frederick M. Bartlett & Company, which in effect was Bartlett, personally.

Without obtaining any consent from the owner, as the leases provided, the plaintiff sublet all the property but 5 vacant acres to one Peterson, reserving the right to the use of part of one of the out buildings.

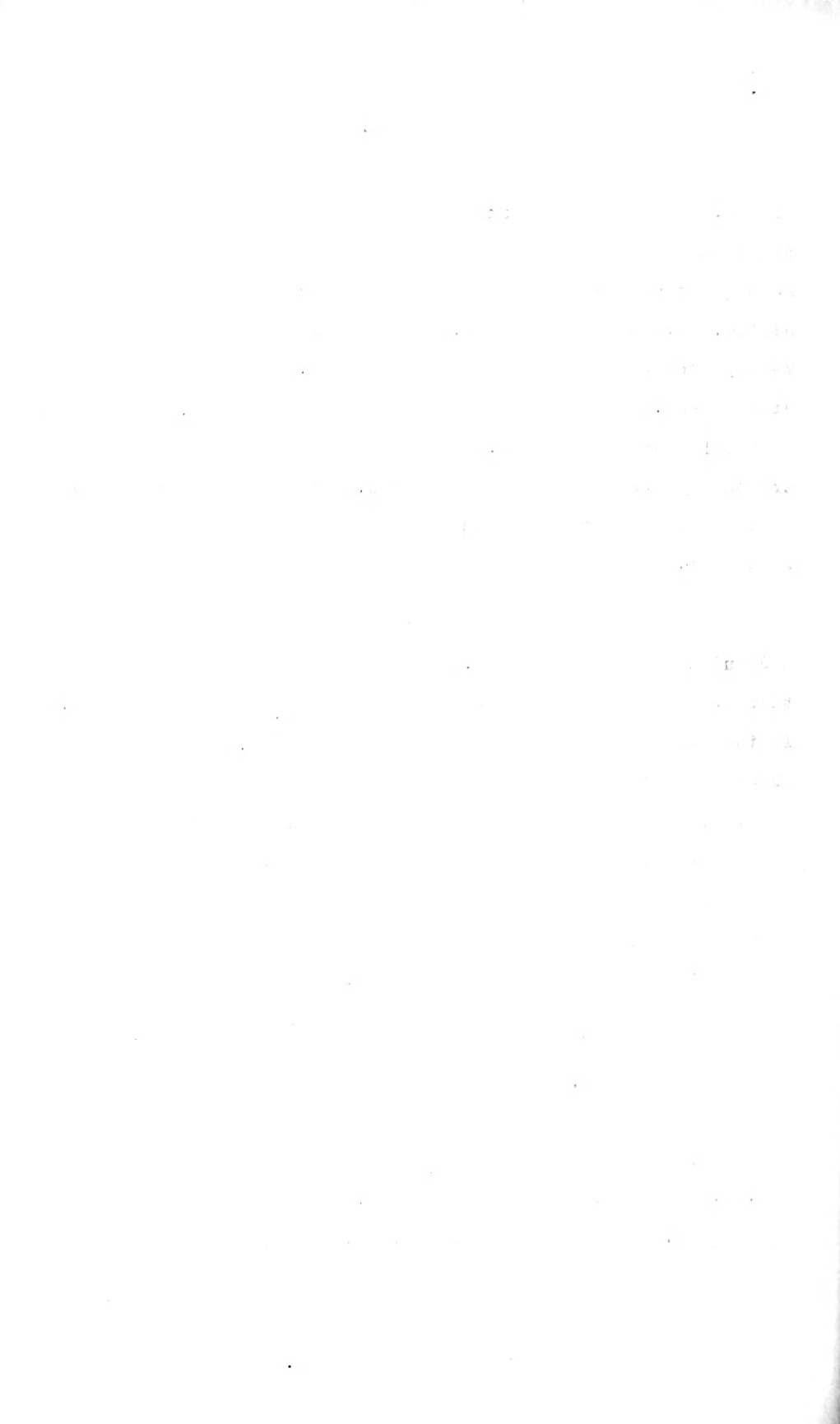
The plaintiff received a written notice from the Pullman Land Association, under date of October 31, 1916, advising him that the property in question "has been sold, and said leases are thereby terminated. In accordance with the terms and conditions contained in said leases, you are hereby requested to immediately vacate said * * * property and deliver up possession thereto. Upon so doing we will rebate to you the rental for the unexpired term of said leases." The plaintiff retained possession of the property until after his leases expired, February 28, 1917. He testified he told the Petersons they might remain on the property until April, 1917, and they

did so. Sometime in March or April the defendant began operations on the property, looking toward its subdivision and sale. He began the erection of a small brick building to be used as an office. Sidewalks were laid. About this time the fence posts were pulled up and the wire was rolled up. Most of the posts disappeared. The buildings were torn down and most, if not all, of the lumber disappeared. The various pieces of farm machinery on the premises also disappeared. It is for the value of this property that the plaintiff brought this suit against the defendant.

That defendant's employees took down the fences and buildings is not denied. The plaintiff's evidence fails to show that the fences and buildings were removable fixtures. In the absence of some showing to the contrary, it must be presumed that they passed with the land to the defendant's trustee, the Chicago Title & Trust Company, under the warranty deed from the Pullman Land Association. There is no evidence in the record tending to characterize them as removable fixtures, unless it be the bare fact that the plaintiff purchased the buildings from Gwathmey.

But even if we treat the fences and buildings as removable fixtures, it seems clear that the plaintiff lost all right to them when he failed to remove them before the end of his term, and while he remained in possession as tenant. (Ill. Sts. J. & A. par. 7073); Lonnely vs. Thieben, 9 Ill. App. 495; Fellows vs. Johnson, 183 Ill. App. 42.

As far as the farming implements are concerned, the evidence does not show that the defendant had anything to do with their disappearance. The tenant testified that workmen



from the Pullman shops passed over this property night and morning; that the fence posts disappeared in the night but the wire was still there when he left the premises early in April. A witness for plaintiff testified that he saw a man who was hauling cinders on the property, haul away the farm machines behind his wagon. Cinders were used in the construction of the sidewalks. The office manager for defendant, called as a witness by the plaintiff, testified that McLaughlin Brothers built the sidewalks.

In our opinion the plaintiff's evidence failed to make out his case and the trial court did not err in directing the jury to find the defendant not guilty. The judgment of the Superior Court is therefore affirmed.

AFFIRMED.

Taylor, P. J., and O'Connor, J., concur.

173 - 25428

EDWARD SULLIVAN and FRANK SULLIVAN,
co-partners, doing business as
SULLIVAN BROS.,

Appellees,

v.

F. OPPENHEIMER,

Appellant.

APPEAL FROM

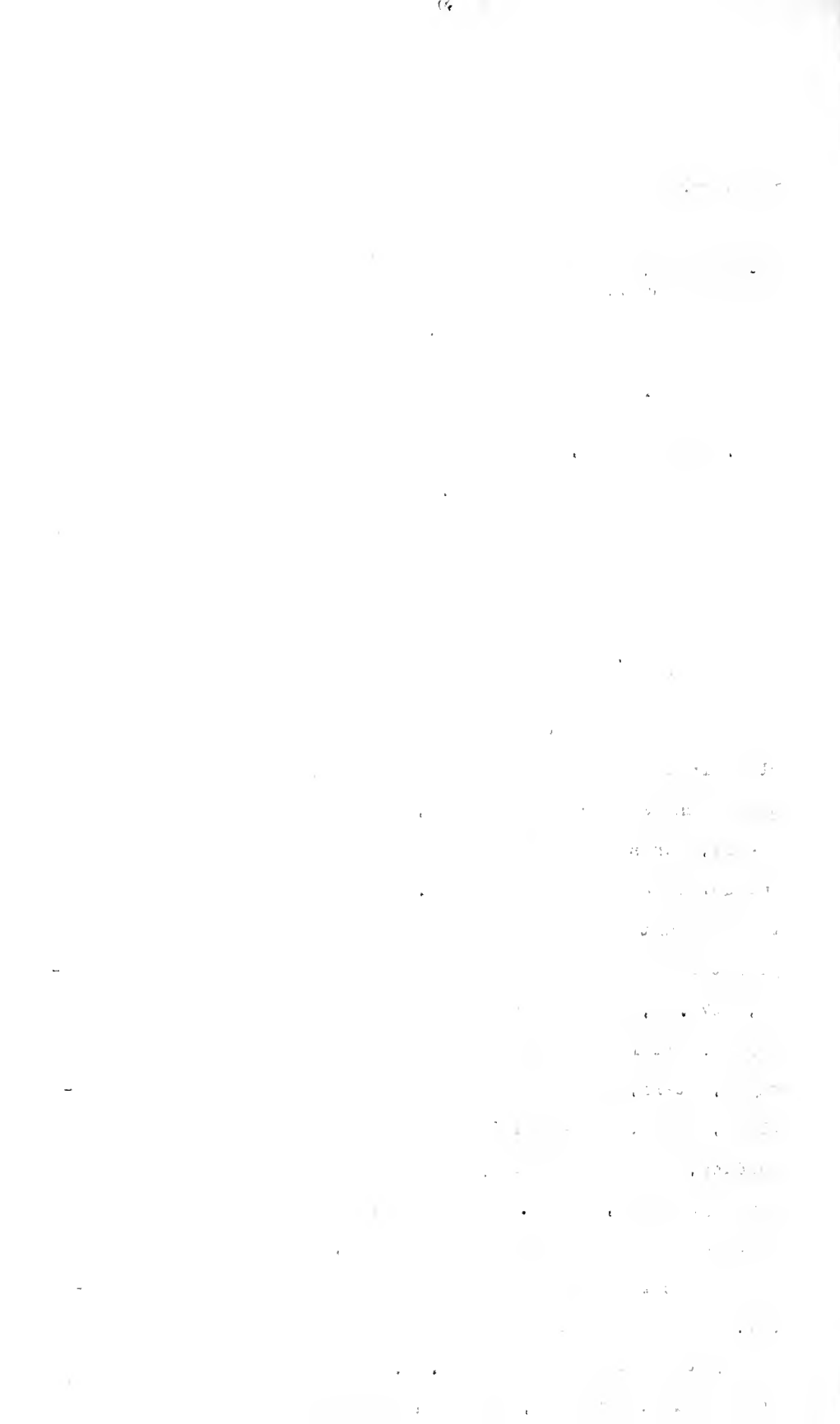
MUNICIPAL COURT

OF CHICAGO.

219 1.A. 657

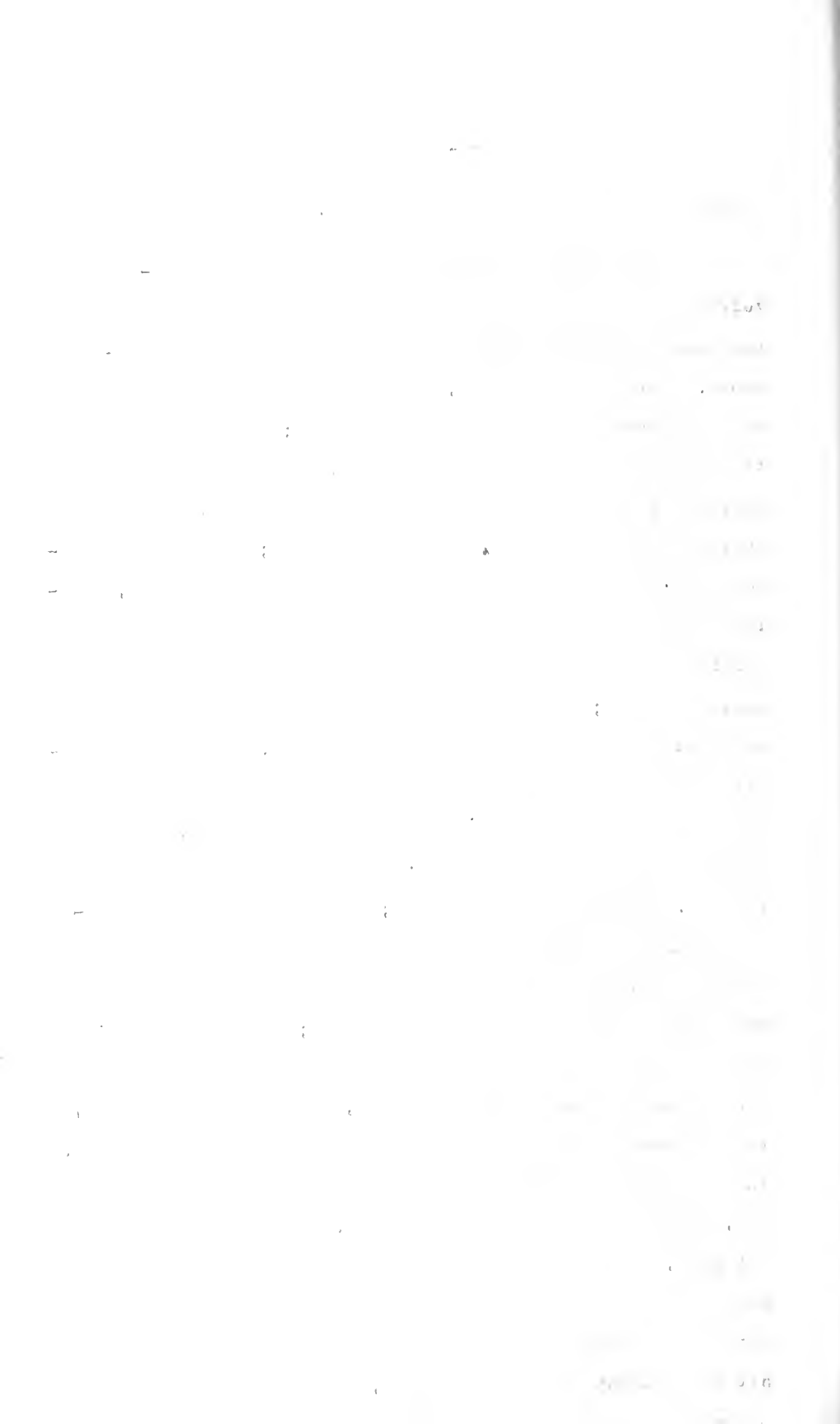
MR. JUSTICE THORSON delivered the opinion of
the court.

The plaintiffs brought this action of the fourth class in the Municipal Court of Chicago, seeking to recover the purchase price of 24 lambs, 7 sheep saddles and 23 plux (heart, lungs and liver) which they alleged had been sold and delivered to the defendant. The evidence was presented to the court without a jury resulting in a finding for the plaintiffs and a judgment in their favor for the amount claimed, \$179.85, to reverse which the defendant has perfected this appeal. It is the contention of the defendant that when his buyer, Stern, purchased the goods in question from the plaintiffs, he put an indelible ink stamp on all the lambs and saddles, and when delivery was made to his place of business two days later, the lambs and saddles delivered were not the ones so marked but were much inferior, and he returned them to the packing house at which the plaintiffs did their killing. The defendant kept the 23 plux for which he was willing to pay the agreed price of \$2.30. Of course if the facts were as defendant contends, he would have the right to return the



lambs and saddles and retain the plux.

The only issue presented on this appeal involves the question of whether the court's finding and the judgment are against the manifest weight of the evidence. For the plaintiffs, one Bowman testified that he was a butcher employed by the plaintiffs; that he sold the lambs and sheep saddles to Stern, the defendant's buyer; that the latter put a stamp on each one of them, this stamp making a mark on the meat in indelible ink; that he (the witness) helped deliver these pieces of meat to the wagon, handing them out one by one and that at that time each piece carried the stamp referred to and that the meat was then in good condition; that two days after the meat was delivered it was returned but they would not receive it. One Lynch testified for the plaintiffs that he loaded the lambs and saddles with Bowman and that each piece had a stamp on it; that he delivered the meat to the defendant's place of business and that Mr. Stern signed the ticket; that at that time the defendant asked Stern if they were stamped and that the witness replied that they were and that the defendant said something to Stern about the price being too high; that on the following day the defendant asked the witness to take the meat back but he said he had no authority to do that, and the day following, the meat was returned to the packing house by an expressman; that the witness then saw the meat and the "stamps were tore off, cut off the legs of every lamb". The plaintiff, Edward Sullivan, testified that he saw the lambs after they had been purchased and before they were delivered and noticed that they were stamped but did not notice what stamp it was; that after the lambs had been returned, they "had a mark where there was a stamp on them but it had been cut off and the



stamp of the ink was still on the lambs where they tried to scratch it off"; that he examined each of the lambs after they were returned. One Kennedy testified that he saw Stern buy this meat and that he saw the stamp on the lambs but did not know what stamp it was, and that he saw these lambs loaded and that the ones loaded were the same ones that were stamped; that he saw them after they were returned and could see where the stamp was removed, "they did not get it all off, - there was still ink on the sheep". For the defendant, Stern testified that at the time he purchased the lambs and saddles he asked one of the packers, at the plant where the plaintiffs did their killing, to loan him a stamp as he did not have the defendant's stamp with him and that he used this borrowed stamp in stamping the lambs and saddles which he purchased; that Bowman was present at that time but that he did not remember seeing Kennedy about; that he signed the receipts for the lambs and saddles when they were delivered but he was very busy at the time and did not examine them; that he put them on the scale and then hung them up and that when he examined them fifteen or twenty minutes later, he noticed that they were not the lambs that he had stamped but were of a very inferior grade, whereupon he tried to reach the plaintiffs over the telephone; that he sent them back to the packing house by an expressman the next morning; that the packing house later called him up and said that the plaintiffs' instructions were, not to receive the goods as they were the ones that had been purchased and that the witness replied that they were not the goods he had bought and that he would not accept them; that the packer said he would have to send them to a commission man for disposition and asked whether they should be sent under the name of the witness or the plaintiffs and the witness re-

plied that the goods belonged to the plaintiffs and that they should not be sent under the name of the witness; that later he received a check for \$72.73 from the packing house, presumably as the proceeds of the sale through the commission man but that he returned the check to the packing house. He denied that he had removed the stamps from the lambs or saddles at any time after putting them on. The defendant testified that about 9 o'clock on the morning of the delivery of the meat to the defendant's place of business, Stern came to him and told him that these lambs and saddles were not the goods he had purchased and that he examined each lamb, to see if it was stamped and that none of them were stamped when he examined them.

In rebuttal, one of the members of the packing house firm referred to, testified that he saw the goods in question after they had been returned and that the stamps had been removed,- "the stamp had been cut off; it showed where they had been cut off." He testified further that he had loaned Stern a stamp on the occasion of the purchase in question, and this stamp did not have the defendant's name on it. Bowman had testified that the stamp included the defendant's initials and Lynch had testified that it included the name "Oppenheimer."

On that state of the record we are unable to say that the judgment is against the manifest weight of the evidence. Certainly, if the court believed that the witnesses for the plaintiff were telling the truth, to the effect that the lambs and saddles which Stern admits he had purchased and put the stamp on, were the ones actually delivered to the

defendant and receipted for by Stern, there is every reason why the judgment for the plaintiff should have been entered. The fact that two of the witnesses gave testimony, tending to indicate that the stamp used by Stern was Oppenheimer's stamp, whereas it is quite apparent from the record that it was not, would not necessarily furnish a reason for reversing the judgment.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

185 - 25440

LORNETTA REILLY,

Appellant,

v.

CHICAGO RYS. CO., et al,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

2191A 657

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Mrs. Reilly, brought this action against the defendants, seeking to recover damages which she claimed to have suffered as a result of an injury alleged to have been received by her while a passenger on one of their cars. The issues were submitted to a jury and they returned a verdict finding the defendants not guilty, following which the court entered judgment against the plaintiff for costs, to reverse which she has perfected this appeal.

In support of her appeal the plaintiff contends that the judgment is against the manifest weight of the evidence and further that the court erred in the giving of certain instructions. We have carefully examined the evidence as we find it in the record and are of the opinion that the plaintiff's first contention is not tenable.

The plaintiff and her husband, with their two children, a girl of about eight years and a boy a year or so younger, became passengers on the car in question about 8:30 o'clock on the evening of July 4, 1916, at Wentworth avenue in the City of Chicago. The car was a westbound

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car on 63rd street. The plaintiff and her family had been visiting relatives during the day and were returning to their home in Joliet, Illinois. When they got on the car there were a number of passengers standing and the seats were all occupied. It is not alleged or claimed that defendants were negligent in permitting the car to be overcrowded. It is not clear just how crowded the car was. Although the records of the defendants show 232 fares collected during the trip, it appears that the car was filled and emptied several times as it intercepted several north and south main lines, at which numbers of passengers transferred. From a reading of the testimony as to this point it would appear that there were quite a number of people standing in the aisle in the rear part of the car but not so many in the front part. When the plaintiff and her family got on the car her husband and the little boy remained on the back platform while the plaintiff and her little girl went into the car and stood in the aisle at a point a little ahead of the center of the car. The plaintiff's husband testified that a "pretty good sized boy", sixteen or eighteen years of age, got on the car at the back platform after they had boarded the car and that he was carrying a large bundle of newspapers, over two feet in height, on his back; that he was standing in the way of the passengers and the conductor told him to go inside, which he did; that he did not see the boy again after that. He further testified that fifteen or twenty minutes after this boy got on the car it gave a "terrific jerk"; that it was going to stop and nearly did so but before coming to a full stop, it started up again; that it jerked him forward against the railing and then threw him back against the back of the car; that after this jerk he

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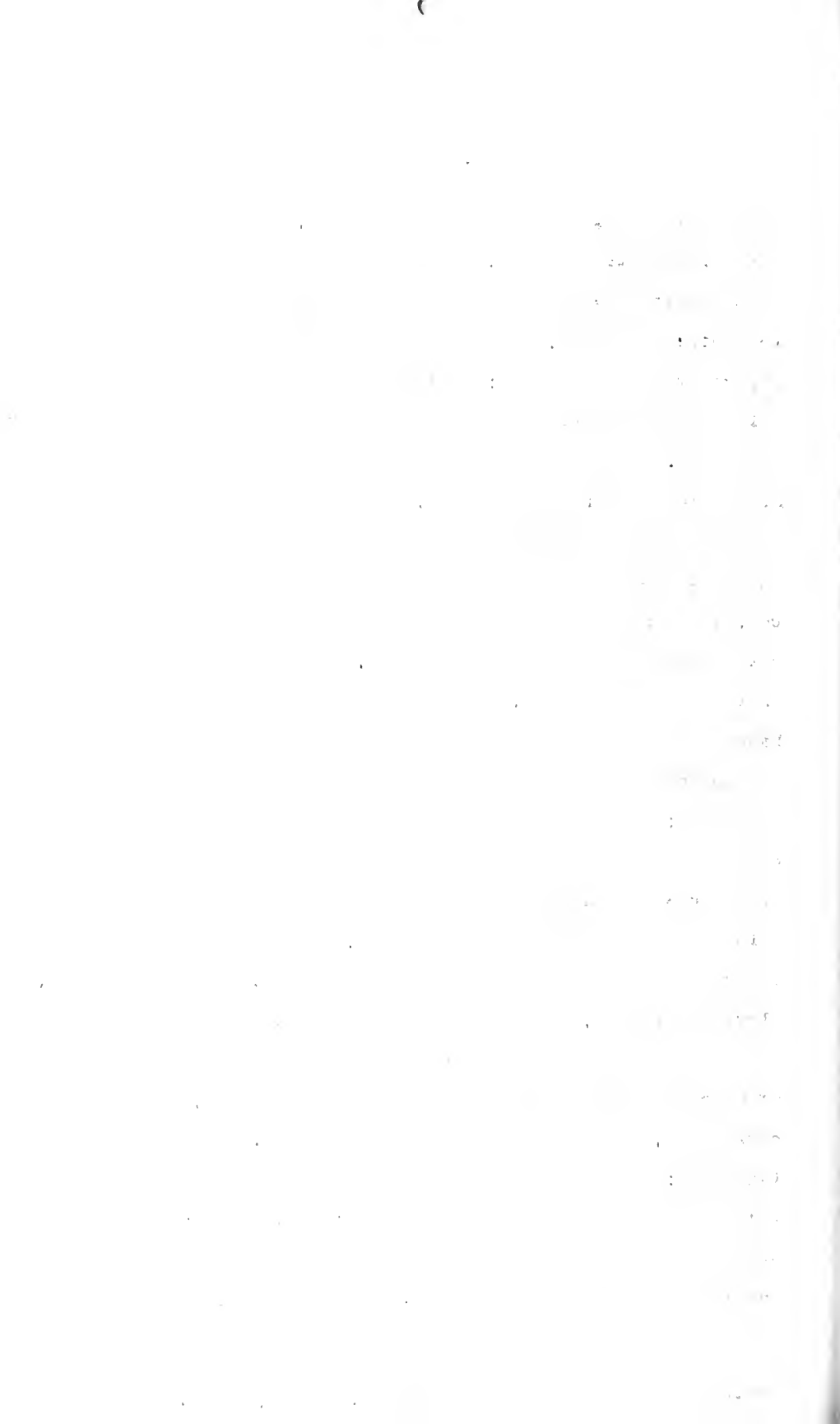
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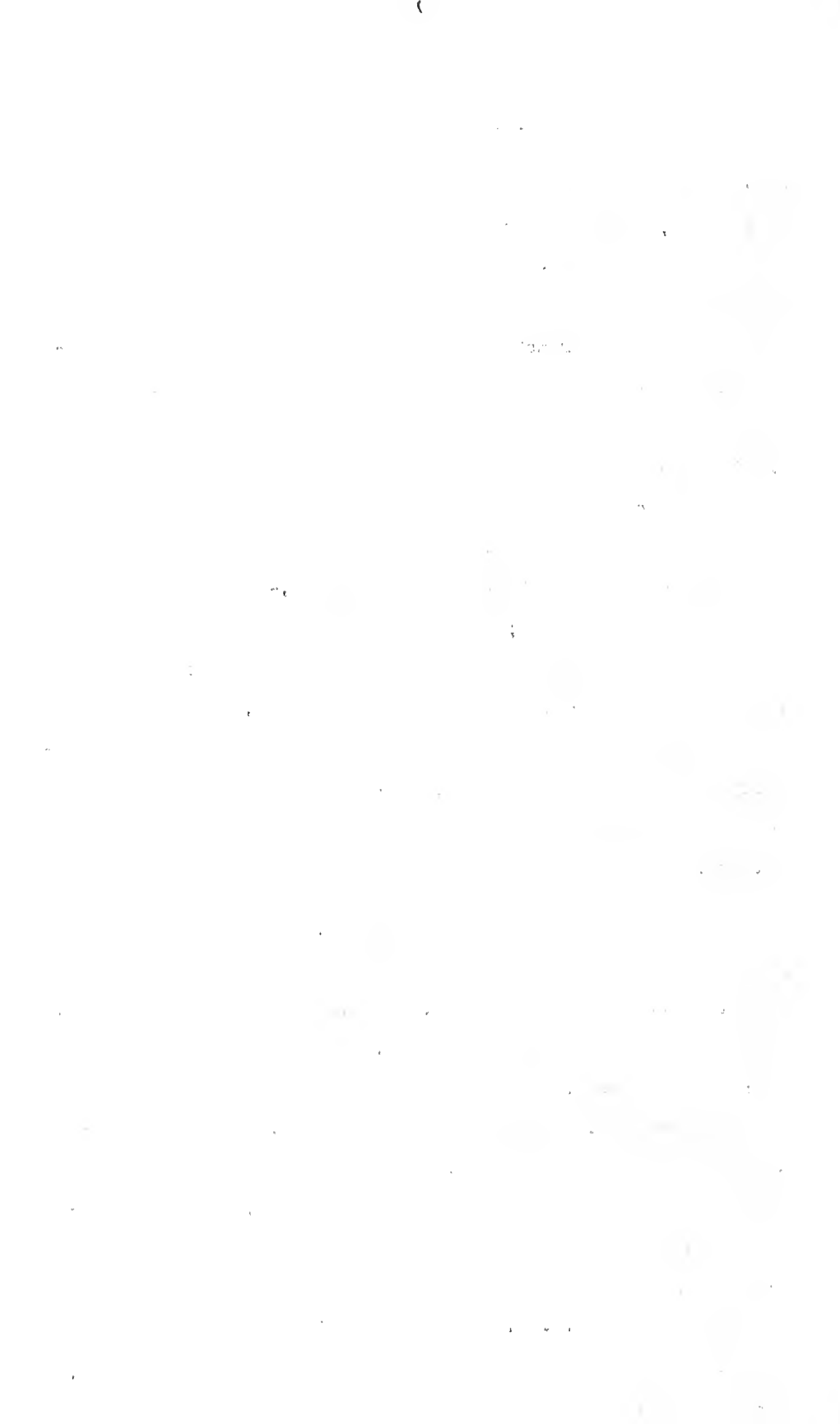
went inside of the car and found his boy, who had gone into the car some time before, bleeding at the mouth and that a little further along he found his wife lying back on a seat in a sort of stupor; that he did not notice anybody with papers around there then; that after they had gone about half a mile further he told the conductor that his wife had been hurt. The plaintiff testified that as she and the little girl were standing in the aisle, a boy with newspapers on his shoulder passed further up toward the front end of the car and that later when he was on his way back to the rear of the car, the car gave a jerk and threw the boy against her "and between the jerk of the car and him, it threw me off my feet"; that she fell backward, striking the end of a seat with the base of her spine and then fell to the floor; that the bundle of papers the boy was carrying, "extended from his shoulder to his head"; that before the jerk she noticed that the car almost came to a stop; that this "threw us forward and then it started up again with a little jerk and threw us backward"; that her spine and hip collided with the seat; that several people helped her up and she fainted as they were doing so. The little girl, eleven years old, at the time of the trial, described the occurrence substantially as her mother did. She said that the bundle of newspapers was "about two and a half feet high; the size of newspapers, a little higher than it was wide. They were tied together"; that a man got up and gave the boy a seat and he put the papers on the floor and when he got up, as he was putting the papers on his back the car jerked and threw him forward and the papers hit her mother and she fell down.

The plaintiff and her husband testified that she continued in a condition of stupor until they reached the end



of the line and that she then left the car with her husband's assistance, he placing his arm about her to support her and the conductor assisting in helping her to get off the car. They transferred to another car which took them some distance further where they again transferred to the interurban line which carried them thirty or forty miles to the city of Joliet. They left the latter car several blocks from their home and the plaintiff's husband testified that he carried her all the way from the car to her home and that he then called their family physician, who came in about an hour. The doctor testified that upon this occasion he found her back and hip bruised, - black and blue and very sensitive to touch; that she complained of terrible pain and he gave her a hypodermic injection of morphine; that he visited her every day for three or four weeks, during which time her condition continued very nervous and she complained continually about her back and hips; that she remained in bed several weeks and he visited her every few days up to the middle of October.

At the time of the trial, Mrs. Reilly was thirty years of age and she had been married twelve years. It appears from the evidence that in 1908, shortly prior to her marriage, while working at a store in Joliet, she fell through a trap door in that store. She testified that this did not injure her seriously but gave her a bad shaking up. It further appeared that in December 1912, while the plaintiff and her family were getting on or off a car in Joliet, something happened which it was claimed caused an injury to the plaintiff's little boy and on that occasion they settled with the street car company for \$100.00. The plaintiff's husband testified that this represented \$25 for the injury received by the boy, \$25 for the loss of time suffered by the witness by reason of



the accident, and \$50 compensation to the plaintiff for her care of the boy. The evidence further showed that in 1913 the plaintiff's mother and brother came to her home and they got into an altercation, her mother striking her in the face and tripping her up so that she fell to the floor. It further appeared that in 1917, after the accident involved in the case at bar, the plaintiff was a passenger on a street car, in the city of Joliet, which jumped the track and that on that occasion she made a settlement with the company for \$135. She testified that on that occasion she was in bed for nearly a month. She also experienced a fainting spell at the time of that accident. From the testimony of the plaintiff and her husband it appears that she has had these fainting spells very frequently since the occasion of the accident involved in the case at bar but that she had never been in the habit of fainting previous to that time.

At the time of the trial the conductor of the car in question, who had left the employ of the defendants in October, 1916, was a farmer in Wisconsin. He testified he had refreshed his recollection of the alleged accident from his trip sheet; that on that trip they had an average load of passengers; that he had not noticed the Reillys until Mr. Reilly spoke to him, which was just before they reached the end of the trip when he went inside to get the register; that there were then two other passengers on the car; that Mr. Reilly told him his wife had been injured by a man carrying a heavy package of papers into the car and that he had bumped into her; that he spoke to the other two passengers, in Reilly's presence, and they said they had not seen the accident and knew nothing about it. He further testified that he generally faced the front of the car and

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that he had seen no commotion on the car at any time of the trip and that no one had told him that a lady had fallen or fainted; that when they reached the end of the line he asked Reilly if he needed any help and he said, No; that the Reillys left the front end of the car without any assistance from him; that Mrs. Reilly's clothing was not disarranged in any way and that she did not appear to limp and that he saw nothing wrong with either of the children. He also testified that he recalled no movement of the car which threw him off his balance or disturbed any of the passengers and that he had no recollection of a newsboy getting on with papers.

The motorman testified that nothing occurred on this trip, requiring an emergency stop and that he did not remember any jerks during the trip. Some of the plaintiff's neighbors testified (for the defendants) to seeing her engaged in her usual household duties, such as hanging out the washing, during July 1916 and the months of that summer when she testified she was almost entirely incapacitated.

The defendants' witnesses contradicted the testimony of the plaintiff and her husband in a number of particulars. The conductor testified that when Mr. Reilly reported the alleged accident to him near the end of the trip, he asked him why he had not reported it sooner and that Reilly replied that the company was not at fault in any way; that he was a railroad man himself and knew that the conductor would have to make a report. Reilly denied making any such statement. As to the alleged trap-door incident, Mrs. Campbell, plaintiff's next door neighbor, testified that at that time the plaintiff complained about her back and that she said she "ought to have sued the people for it". The plaintiff testi-

fied she never made such a statement to anybody. With reference to the street car accident of December, 1912, one Heun, superintendent of transportation of the Chicago and Joliet Electric Railway Company, testified that Mrs. Reilly then claimed that she had been injured in that accident about her back, caused by striking it against the seat of the car and that when Mr. Reilly came to see him about the accident he said his wife had received a bruise on her back and that the car had stopped suddenly, causing the handle of the door to strike her and that her back was black and blue and that the child had his lip cut by being thrown against the seat. Both the plaintiff and her husband specifically denied making those respective statements. In regard to the altercation the plaintiff had with her mother and brother, a Miss. Schmitz testified that the plaintiff told her about that occurrence, saying that her husband was not home at the time and that she lay on the floor until her husband came home and found her there; that her mother hit her back and she would have to have an operation and would never be well again; that she had been pregnant at the time and that her experience had caused a miscarriage. Mrs. Schmitz, the mother of the witness last referred to, testified that the plaintiff told her that her mother had beaten her up and caused a miscarriage. The plaintiff testified that she did not faint at the time of the altercation with her mother and that she was not left in a fainting condition; that she did not tell any of her neighbors that she had been badly hurt by her mother; that she had mentioned the incident to them but had not said she was badly hurt; that she could not say she was pregnant at the time or that she was delivered of a still born child and that she had never told anybody that she was so delivered. With reference to the street car accident of March,

1917, one Jack, assistant superintendent of the Chicago and Joliet Electric Railway Company, testified that when he talked with Mr. Reilly about that accident the latter stated that his wife "got hurt on a Cass street car * * * last night,- she had her spine hurt by being pushed against a seat in the car,- that she had been doctoring for nine months * * * for her spine and she struck the sore place on the seat, causing her to faint." Mr. Reilly in his testimony specifically denied having made these statements.

Miss Schmitz testified that on one occasion the plaintiff's husband said to her "If you do what I tell you, there will be a lot in it for you," and that following that she had not been on particularly friendly terms with the Reillys. It also appeared that there had been some friction between the Schmitz family and the Reillys, over the use of the Reillys' telephone by Miss Schmitz.

The jury had the advantage of a personal observation of all these witnesses as they testified, and with such conflicting evidence in the record as is apparent from the references to which we have made, we cannot say that the verdict and judgment are against the manifest weight of the evidence.

The plaintiff further contends that the court erred in giving the jury certain instructions. The first instruction, given by the court, of which the plaintiff complains, read as follows:

"If you believe from the evidence, under the instructions of the court, that the car in question, on the occasion in question, was being operated with the highest degree of care reasonably consistent with the practical operation of the road and the mode of conveyance adopted and was moving with the ordinary and usual movement necessarily incident to the practical

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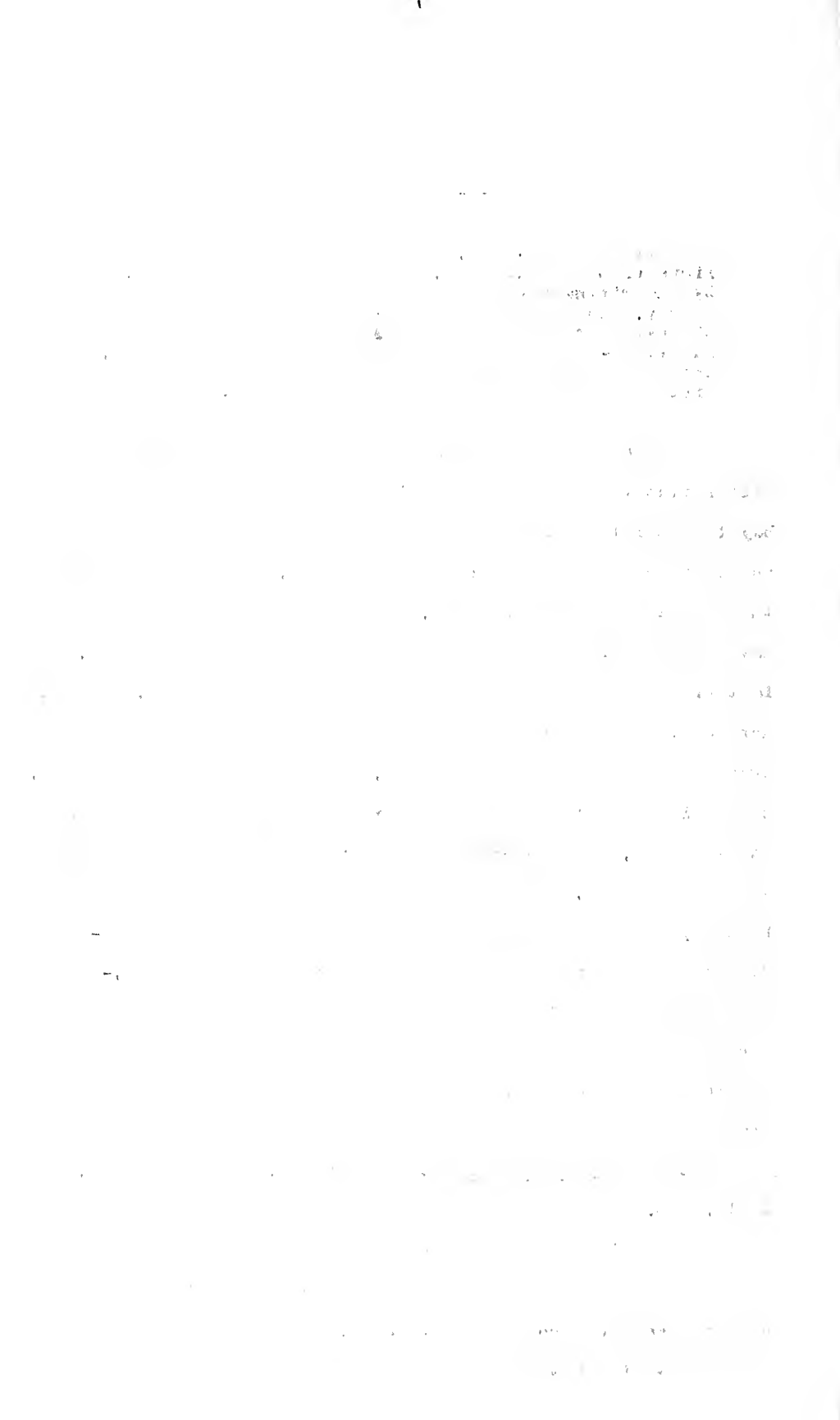
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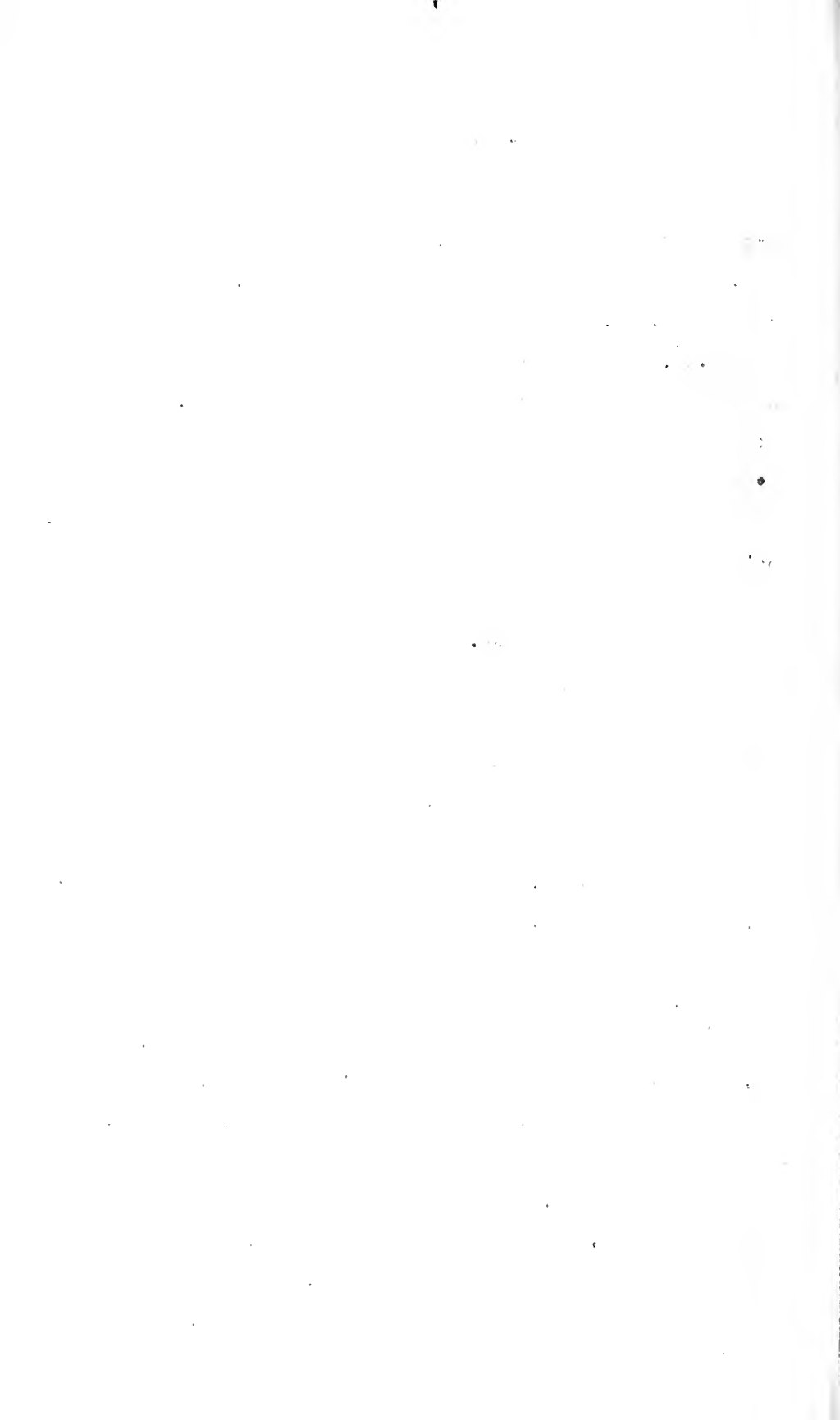
operation of said car, and if you further believe from the evidence, that the plaintiff could, by exercising ordinary care and caution for her own safety, have avoided injury - if you believe from the evidence that she was injured on the occasion in question - and that she negligently failed to do so, then she cannot recover in this case and your verdict should be in favor of the defendants."

The plaintiff charged in the first count of the declaration that the defendants negligently permitted the boy to enter the car with the large bundle on his shoulder and to ride near to the plaintiff so that, while she was in the exercise of ordinary care, the boy on account of the movement or jolting of the car and by reason of the bundle, lost his balance and was thrown against the plaintiff, knocking her down. The second count was like the first except it was there charged that the defendants, in the operation of the car, caused it to jolt and jerk with extraordinary and unusual force and violence, so that while the plaintiff was in the exercise of ordinary care, she was by reason thereof thrown down and injured. It is urged that the instruction referred to excludes the charge of negligence made in the first count,- that the word "operated" is not broad enough to include the matter of permitting the boy to board and enter the car with the large bundle on his shoulder. In support of this contention the plaintiff has called our attention to a number of decisions and particularly Alabama Great Southern Ry. Co. v. Gilbert, 6 Ala. App. 372. In that case the declaration charged that the plaintiff's injuries had been caused by the negligent manner in which the defendant "operated the train" upon which he had been a passenger when injured. It appeared from the evidence that the train had been so crowded that the plaintiff



had been obliged to ride on the steps and as the train rounded a curve at high speed, he was thrown off. The court held that the words "operated the train", as used in the declaration, meant "controlled the movement and speed of the train", and that it could not be said that the plaintiff had charged that his injuries were due to the failure of the defendant to furnish him a reasonably safe place within which to remain on said train while he was a passenger but only that they were due to the negligent manner in which the defendant's servants controlled the movement and speed of the train. In our opinion that reasoning cannot be applied to the instruction above referred to. In the case at bar the plaintiff charged specifically that the defendant had been negligent in permitting the boy with the bundle to enter the car under the circumstances and also in operating the car so as to cause it to make a violent jolt or jerk. In the light of those two charges of negligence and with all the evidence that was before them on those charges, we fail to see how the jury could possibly have been misled, by the instruction referred to, into believing that they could or should return a verdict for the defendant, even though they might believe from the evidence that the defendant had admitted the boy with a large bundle, into the car, as testified to by the plaintiff's witnesses, and that it amounted to negligence, under the circumstances, to do so. Even in the restricted interpretation of the instruction contended for by the plaintiff, the instruction could hardly be considered reversible error, for even in the first count, the fact that the boy was thrown against the plaintiff, was charged to be "on account of the movement or jolting of said car."

The plaintiff also complains of another instruction



given to the jury, in which the court told them that if they believed the injury to the plaintiff was the result of a mere accident which occurred without the negligence of the defendants, as charged in the declaration or either count thereof, they should return a verdict for the defendants. That instruction was entirely proper. If the incident in question occurred without the negligence of the defendants, as charged, it was a mere accident. It was either one or the other, under the evidence.

The court gave the jury a further instruction as follows:

"It is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of the defendants, if any, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of the injury to the plaintiff; that in no case can a recovery be had for a negligent breach of duty, unless the evidence shows that such negligent breach of duty was the proximate or immediate cause of the injury occurring."

The plaintiff contends that inasmuch as this was a peremptory instruction, the giving of it should be held reversible error because it announced a rule which is not the law, namely, that there can be no recovery unless the negligence complained of was the "immediate" cause of the injury, plaintiff's argument being that the word "or" appearing in the instruction after the word "proximate" must be considered as equivalent to the phrase, "that is to say". The defendant contends on the other hand, that the word "or" may, with good reason, be read in its alternative sense. If the instruction told the jury plainly that the plaintiff could not recover unless they believed from the evidence that the



negligence complained of was the immediate cause of the injury, and thus announced an erroneous rule which is not the law, the instruction, being peremptory, could not be cured by the giving of another one announcing the correct rule. But if the language used in the instruction as given, may be said to possess some ambiguity, even though it is a peremptory instruction, we may look to the other instructions given to see if, in view of them, the jury were probably misled by the instruction complained of into adopting a rule which is not the law.

National Enameling Co. v. McCorkle, 219 Ill. 557, 561; Chicago City Ry. Co. v. McDonough, 221 Ill. 69, 75. In another instruction, the jury were expressly told that if they found from the evidence that the defendants negligently permitted a person to ride within the car and near to the plaintiff, and when said person was holding upon his shoulders a large bundle so that while plaintiff was in the exercise of due care, said person, with the bundle, on account of the movement and jolting of the car, and by reason of the bundle, lost his balance and was thrown against the plaintiff, causing her to be injured, they should find the defendant's guilty. The court also gave the jury a similar instruction involving the negligence charged in the second count of the declaration. In view of these instructions we fail to see how the jury could have construed the instruction to mean, as plaintiff contends, that even though they found that the defendants did permit the boy to enter and ride in the car with the heavy bundle on his shoulder, and that under all the circumstances that was negligence, still they could not return a verdict for the plaintiff because the "immediate" cause of her injury was not the negligence of the defendants, in permitting the boy with the heavy bundle to board and ride in the car under the circumstances,



but was rather the fact that the boy lost his balance and was thrown against her.

Finally the plaintiff complains of the giving of two further instructions which were as follows:

"One mode of impeaching a witness is by showing that the witness has made different and contradictory statements on a material point on former occasions. If it appears from the evidence in this case that any witness has been impeached in this manner, you have a right to take into consideration such impeachment in determining the value of the testimony of such witness or witnesses in connection with all the other facts and circumstances in evidence."

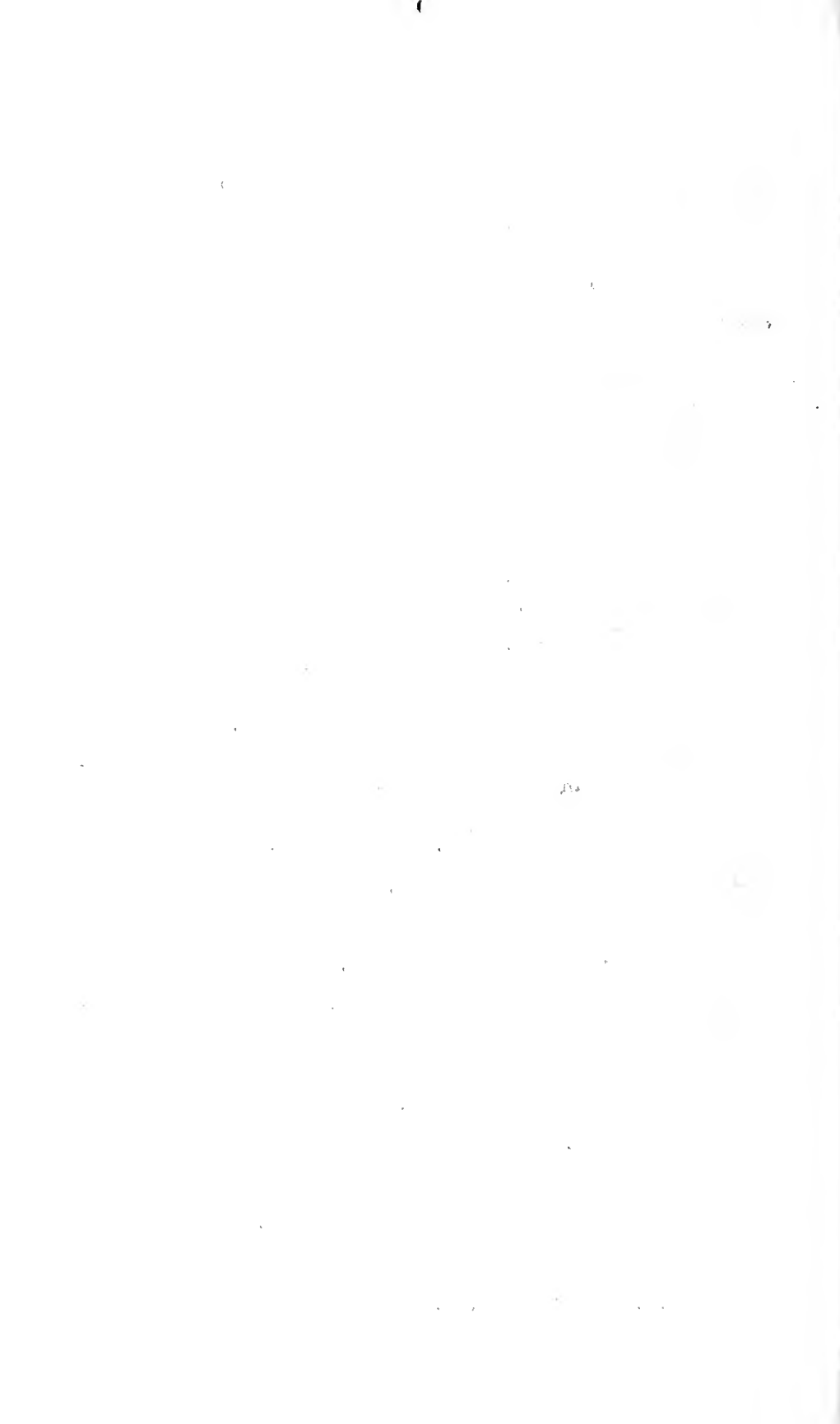
"While you are the judges of the credibility of the witnesses, you have no right to disregard the testimony of any unimpeached witness sworn on behalf of the defendants, simply because such witness was or is an employe of the defendants, but it is your duty to receive the testimony of such witness in the light of all the evidence, the same as you would receive the testimony of any other witness, and to determine the credibility of such employe by the same principles and tests by which you determine the credibility of any other witness."

While the language, as thus used, makes an erroneous use of the word "impeached", it does correctly tell the jury the effect which they have the right to give "different and contradictory statements", made by a witness "on a material point on former occasions". There was no impropriety in the giving of the instruction as last quoted above.

For the reasons given, the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. and O'Connor, J. Concur.



197 - 25452

L. P. SMITH,

Plaintiff in Error,

v.

JULIUS BAUER PIANO COMPANY,
a corporation,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

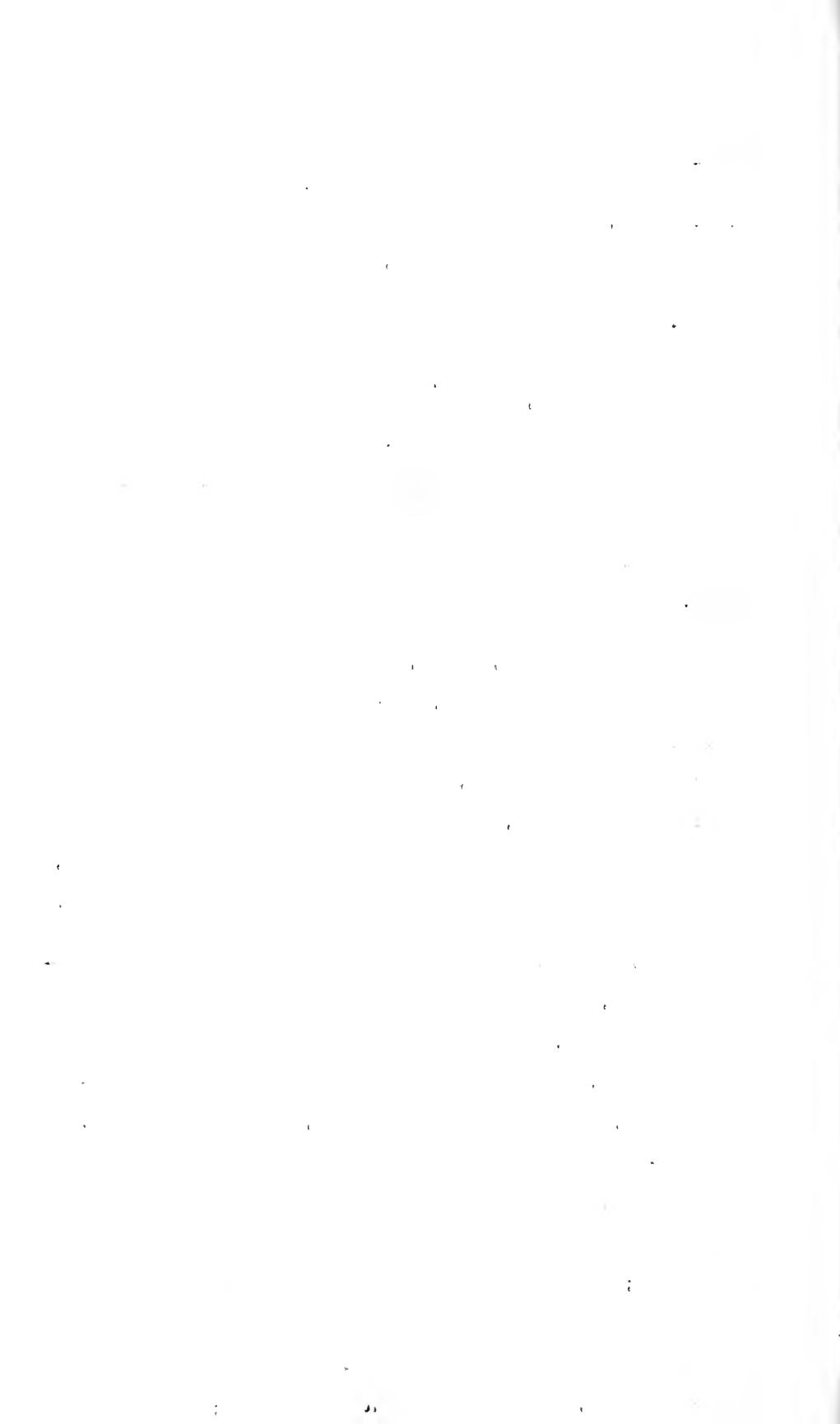
OF CHICAGO,

219 I.A. 657

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Smith, brought this action in the Municipal Court of Chicago, based upon an alleged implied contract for money had and received by the defendant for the use of the plaintiff. A hearing was had before the court without a jury, resulting in a finding against the plaintiff and judgment for costs entered for the defendant, to reverse which plaintiff has sued out this writ of error.

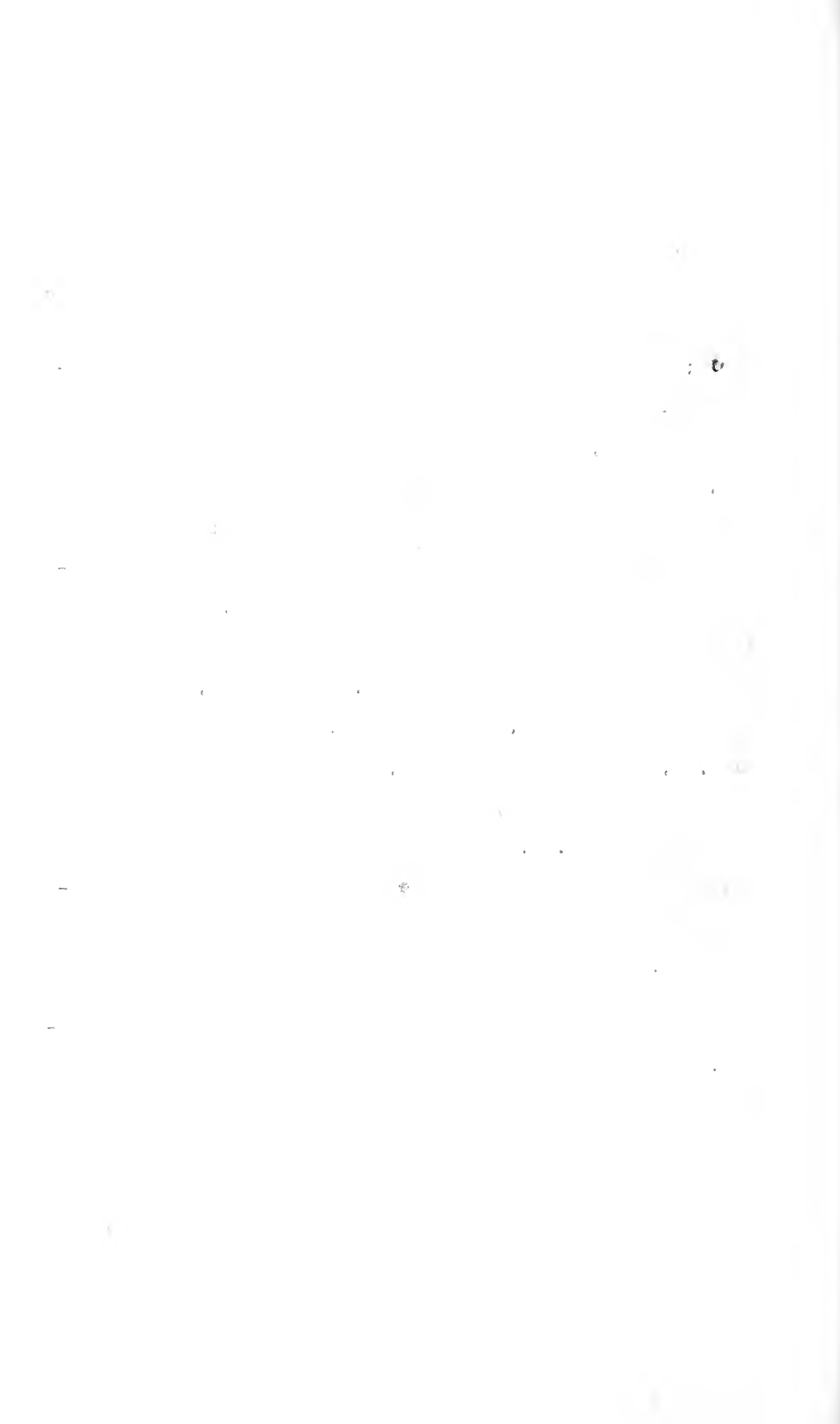
The plaintiff employed the defendant to tune and repair a piano, which was carted to their place of business for that purpose. The piano remained with defendant for several years. Plaintiff described his business as trading "horses, wagons and anything else," including pianos. The vice-president of the defendant company testified that at the time the plaintiff arranged for the repair of the piano he told the witness he wanted the defendant to sell it for him; that on one or two occasions he brought persons to look at it but did not sell it; that he told the plaintiff they would charge him \$1.50 a month for storage and he replied, "make it as light as you can"; that the



plaintiff never asked the defendant to return the piano to him. The treasurer of the defendant testified that after the piano had been at their place of business for some time, the plaintiff asked him to sell it for him as soon as he could; that he told the plaintiff that it would be a difficult matter as the piano had been standing so long it had lost its tone; that the plaintiff said, "do the best you can, I will leave it to you"; that it was finally sold for \$95 which the witness considered a fair price; that when the witness told the plaintiff of the sale he was dissatisfied and said he would sue defendant for \$50. After the sale the defendant sent the plaintiff a bill in which he was charged \$96 for storage at \$1.50 per month, \$5 for tuning and polishing and \$6.50 for cartage, making a total of \$107.50, and credited with \$95, the amount realized from the sale of the piano, leaving a balance due defendant amounting to \$12.50. The plaintiff testified that he never authorized the defendant to sell the piano. He also testified that at the time it was sold, its fair market value was \$100.

No brief has been filed in this court by the defendant. The plaintiff contends that he did not learn of the sale of the piano until after it had been sold and that the defendant did not make a proper effort to locate him and advise him of the intention to sell it. The plaintiff had never left his address with the defendant and after the sale, the defendant located the plaintiff through his sister and sent him the bill referred to.

The evidence was conflicting and we cannot say that the trial court was not justified in concluding that the



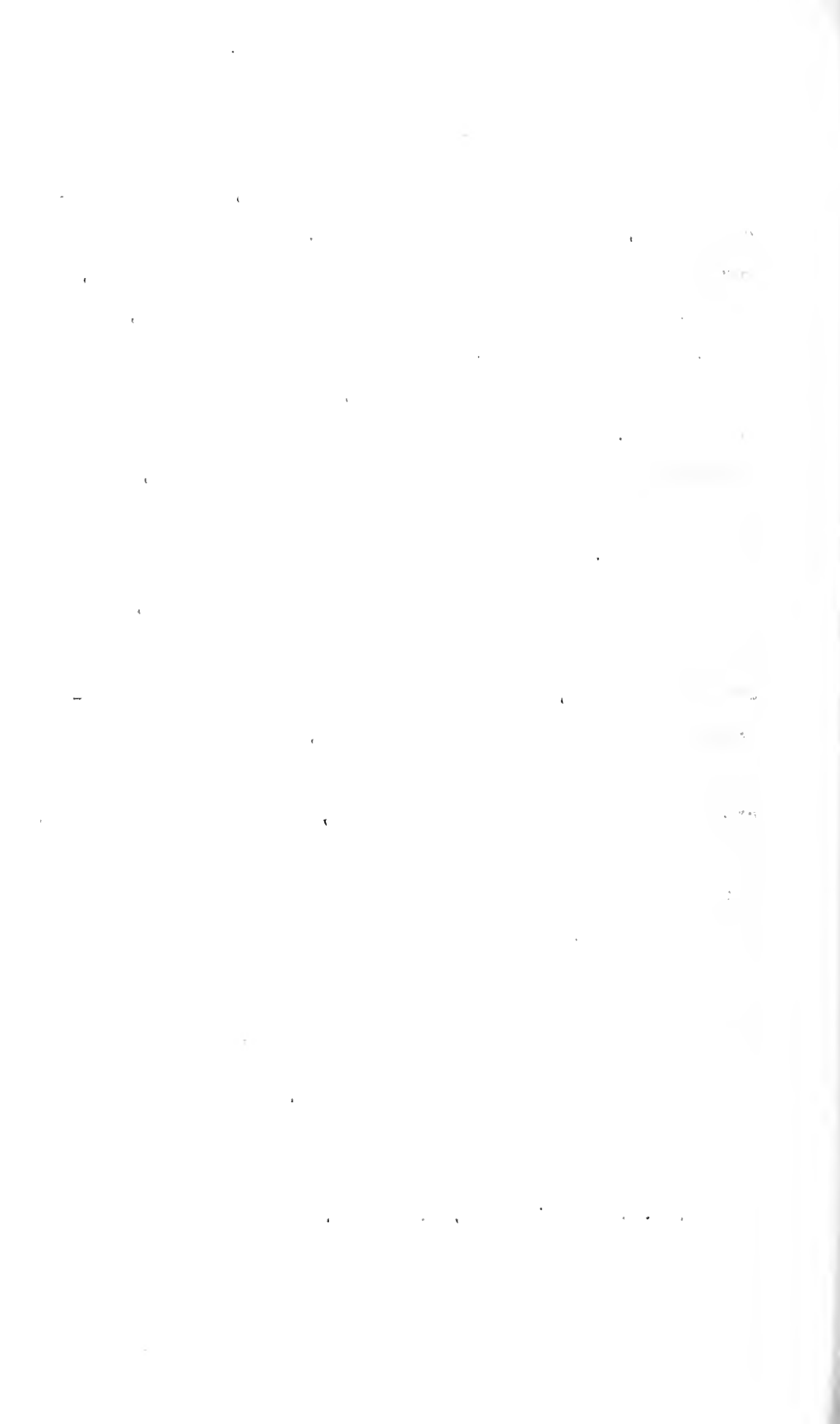
defendant did properly in selling the piano, under the circumstances, to which we have referred. The plaintiff's only contention in this court seems to be that by its charter, a certified copy of which was introduced in evidence, the defendant was incorporated for the object of "the manufacture and dealing in all kinds of pianos, organs and other musical instruments," and that it was therefore not empowered to "establish and operate a storage warehouse business," and therefore it had no power to make a storage charge against the plaintiff.

It seems quite clear that in permitting plaintiff's piano to remain at its place of business for the purpose of sale or trade, the defendant cannot be said to have engaged in a storage warehouse business, the piano having come into its possession for tuning and repairing under an express agreement with the plaintiff, which he does not deny. It was entirely within the defendant's charter powers to extend this service to the plaintiff and to make a reasonable charge therefor.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



214 - 25470

MARTHA COCHRANE,

Appellee,

v.

THOMAS J. COCHRANE,

Appellant.

APPEAL FROM

COUNTY COURT,

COCK COUNTY.

219 I.A. 657

MR. JUSTICE THOMSON delivered the opinion of the court.

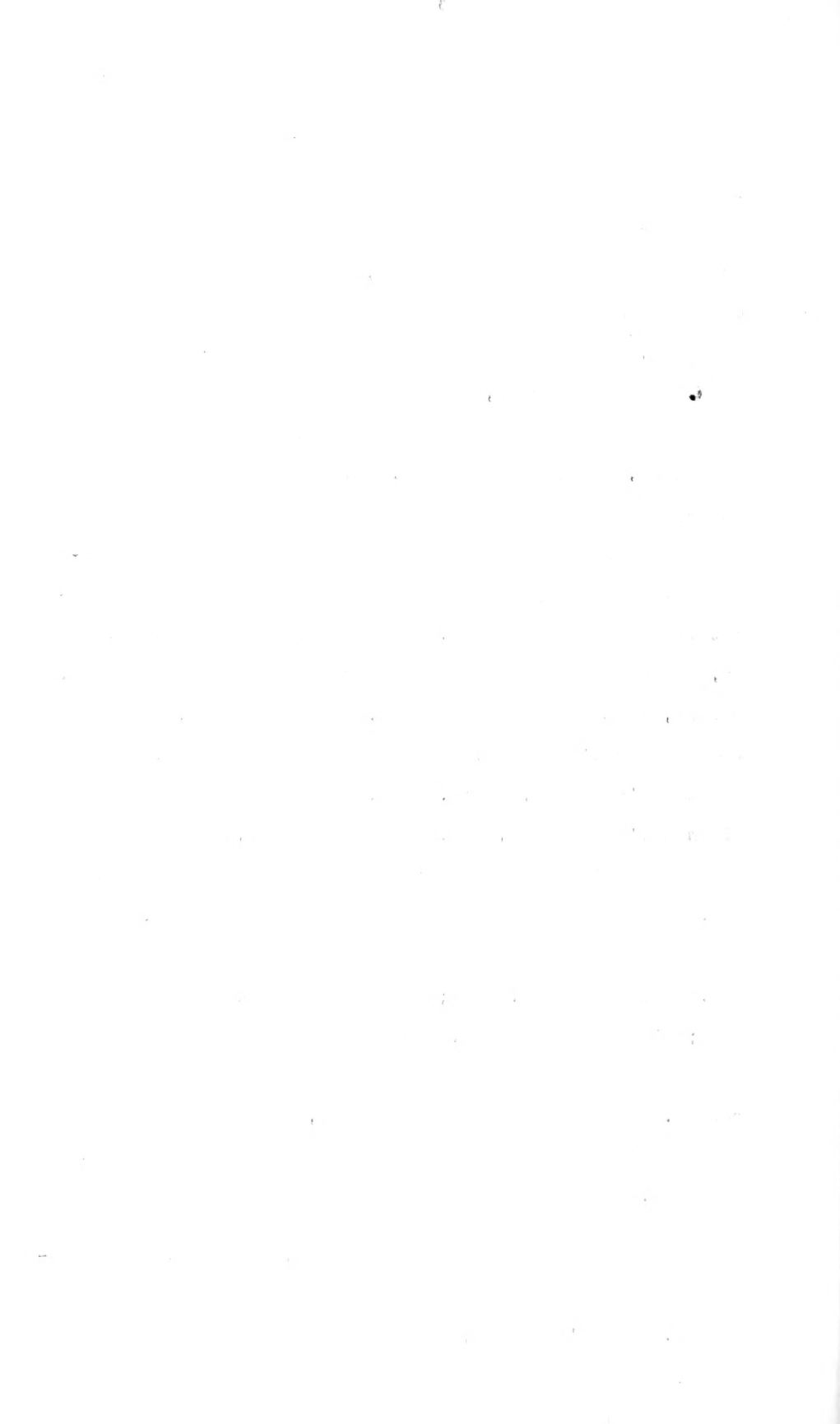
The plaintiff, Martha Cochrane, brought this suit against the defendant on a promissory note for \$170. The issues were tried before the court without a jury, resulting in a finding and judgment for the plaintiff for \$226.72, from which the defendant has appealed.

The defendant gave his promissory note to his aunt, Catherine Davlin, and made certain payments on it. She died leaving a will making the plaintiff her residuary legatee and thus the latter acquired the note. The plaintiff testified she afterwards saw the defendant and it was agreed that \$170 remained due on the Davlin note, whereupon the defendant gave her the note now sued upon and she surrendered the Davlin note; that she received several annual interest payments on the new note but nothing beyond that.

The defendant testified that he had never received the Davlin note, "to my knowledge". The fact that the

defendant had given the plaintiff the note sued upon was not controverted but the defendant testified that after he gave the plaintiff that note, he learned that the old one had been cancelled and that if he had known this at the time, he never would have given the plaintiff the new note. In our opinion, the fact that the Davlin note was returned to the defendant upon the giving of the note sued upon, admits of no doubt. It would be exceedingly strange if the parties would get together and agree upon the amount remaining due on the old note and then the defendant give the plaintiff a new note for that amount without taking up the old one. The real issue of fact involved is, whether the old note was cancelled or forgiven by Mrs. Davlin, as the defendant claims. The plaintiff, who was the defendant's cousin, testified that it was not. The defendant's sister, a Mrs. Ryan, testified that in the plaintiff's presence, Mrs. Davlin had said, "that she did not want Tom's note collected nor any law suit over it." Mrs. Ryan and the plaintiff were not on good terms. The plaintiff testified that she heard a conversation between Mrs. Davlin and Mrs. Ryan; that she heard nothing about a suit; that she heard Mrs. Davlin say she would not surrender the note and that she said nothing about the note being cancelled. In this state of the record, we cannot say that the court's finding was against the manifest weight of the evidence.

The court admitted in evidence, the will, the inventory and the final report in connection with the probate of Mrs. Davlin's estate, and the defendant contends this was error. In our opinion such evidence was competent on the issues involved. Furthermore, when the attorney for the



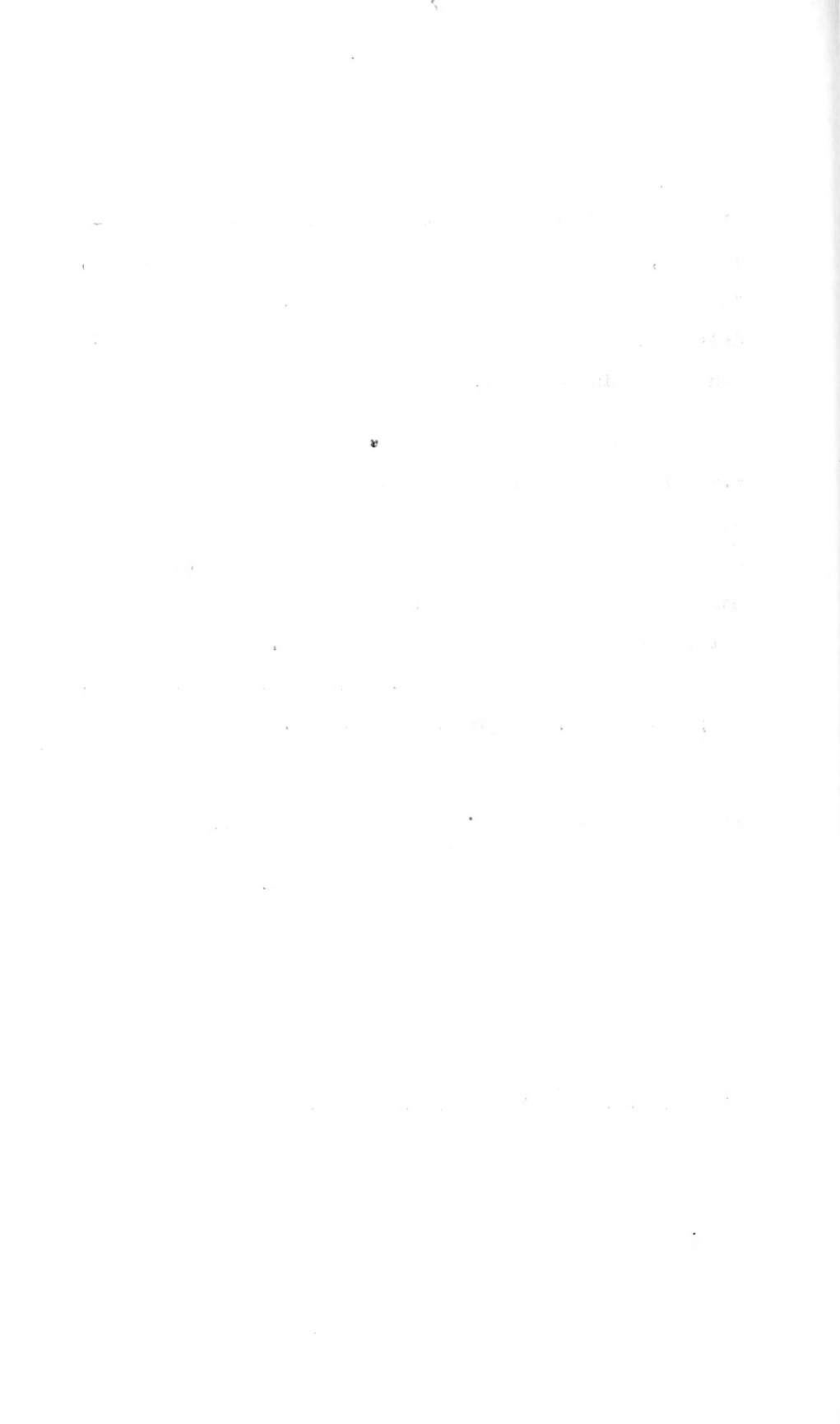
plaintiff offered the first document, which was the inventory, the attorney for the defendant objected saying, "I think the whole file ought to go in." Therefore the defendant could not urge the point now even if the evidence were incompetent.

Finally the defendant contends that the court erred in including interest inasmuch as the note did not mention interest nor did the plaintiff's declaration allege that defendant was liable for interest. The contention is without merit. The note calls for \$170, "at the rate of five per cent per annum." The words can refer to nothing but interest. Hadden v. Innes, 24 Ill. 381; Thompson v. Hoagland, 65 Ill. 319.

We find no error in the record and therefore the judgment of the County Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.



223 - 25479

A. HOLTZMAN,

Appellee,

v.

EMERY MOTOR LIVERY COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2191 A. 657

MR. JUSTICE THOMSON DELIVERED THE OPINION OF
THE COURT.

By this action, the plaintiff, Holtzman, sought to recover for damage caused to his automobile in a collision with a car belonging to defendant, which collision was alleged to be due to the negligent driving of defendant's employee. The cause was tried by the court without a jury, resulting in a finding for plaintiff and judgment was entered in his favor for \$150 and costs, from which the defendant has appealed.

The only point urged by defendant in support of its appeal is the contention that the finding of the court was against the manifest weight of the evidence, and that it showed that the plaintiff's wife, who was driving his car at the time of the occurrence in question, was the cause of the accident.

The plaintiff's wife was driving a light roadster, south in Wabash avenue in the City of Chicago. She testified that as she approached 28th street, which runs east and west and intersects Wabash avenue at right angles, she was on the right hand side of the street; that there was a

big automobile truck ahead of her; that she brought her car to a stop just north of the 28th street crosswalk; that she saw defendant's car, which was a large limousine, coming west in 28th street about 35 miles an hour; that she first noticed this car when it was "about four feet" east of Wabash avenue; that she came to a stop because, "I saw I could not make it". She further testified that the big truck went right ahead and the defendant's car, in crossing Wabash avenue, swerved to the north (apparently around the rear of the truck) and hit her car, turning it around to the west. The damage to plaintiff's car was on the left front side,- the left front fender was broken and also the left front wheel,- the radiator was smashed and the left head lights were broken off.

One Marsh, a boy fourteen years old, testified for the plaintiff, that he was standing in the doorway of a grocery store on the northeast corner of 28th street and Wabash avenue; that Mrs. Holtzman was on the right hand side of the street and stopped as she got to the corner; that defendant's car came from the east and "turned off of 28th street and went up into Wabash avenue to hit her"; that she had stopped about five feet from the corner,- "She was right down by the corner where the people cross"; that defendant's car was going west in 28th street about four feet from the curb and did not turn north in Wabash avenue but went straight across and struck plaintiff's car, which, after the collision was headed west on 28th street about two feet west of Wabash avenue.

One Foster, who also testified for the plaintiff, was standing on the southeast corner of the intersection



in question. He saw defendant's car coming "pretty slow,- it was not going fast," and waited for it to pass, as he was crossing 28th street to the north. He did not see plaintiff's car until after the collision. He testified that there was a big ash wagon going south on Wabash avenue and that it was at the intersection,- "not quite to the corner"; that the part of defendant's car that came in contact with plaintiff's car was the back fender on the right hand side.

One Smith, called as a witness by the defendant, testified that he was driving the ash wagon that was referred to; that he was on the north side of 28th street, on the west side of Wabash avenue; that plaintiff's wife could not get between him and the curb and had to pull out to the left; that "she drove right into this taxicab,- the engine went dead,- she did not put on her brakes or anything * * * she struck the other car on the right wheel,- on the fender,- * * * the big black limousine was going about twenty miles per hour,- the lady was going not more than twenty-five miles per hour, I think * * * The front of the lady's car went right into him,- she hit him between the front and rear wheel, right in the center,- hit the fender * * * she was on the north side of 28th street * * * I was stopped near the curb stone on the north side of 28th street."

The record contains a photograph showing the right side of defendant's car as it appeared after the accident. This photograph shows the rear fender crumpled up, where it curves over in front of the rear wheel and is attached to the step or running board on the side of the car. The

car does not have the appearance one would expect it to have if plaintiff's car ran into it, head on, while going twenty-five miles an hour, as the witness Smith described the accident. The witness Marsh was recalled by the court and testified that there were other vehicles on the street, he said there were two trucks at the corner,- "they were fruit trucks coming from down town, going south on Wabash avenue,- there were three vehicles on Wabash, going south."

In this state of the record we cannot say that the finding for the plaintiff was against the manifest weight of the evidence. The testimony of plaintiff's witnesses is not entirely without contradiction. Outside of the two cars involved in the collision, Foster noticed only the ash wagon, which is not unnatural. He was crossing the street to the north, saw defendant's car coming from the east and paused to let it pass before he crossed. He never saw plaintiff's car before the crash. Marsh mentions the fruit trucks. Plaintiff's wife describes a truck just ahead of her which proceeded across 28th street and says that defendant's car crossed Wabash avenue behind it. When the crash came that truck had passed on to the south and Foster's attention would be fixed on the vehicle's then located at the intersection. In the testimony of eye witnesses to such an occurrence, nothing is more natural than to have some of them describe some things and others describe other things that the first witnesses did not notice at all.

From the description of the damage done by the collision to the plaintiff's car and to the defendant's, and the appearance of the latter car as shown by the photograph in evidence, it would seem clear that the collision

happened in the manner related by the plaintiff's witnesses.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, J.P. AND O'CONNOR, J. CONCUR.

14242

General No. 7069.

Agenda No. 1.

April Term, A. D. 1920.

Emner Lee, Defendant in Error,

vs.

T. J. Hankins, Plaintiff in Error.

Error to the Circuit Court of Christian County.

WAGGONER, P. J.

The defendant in error recovered a judgment for \$1290.00, in the circuit court of Christian County against the plaintiff in error, who has brought the record to this court, and urges such judgment should be reversed for the reason that it is against the manifest weight of the evidence. No other error is presented.

The evidence was conflicting. In reference to several vital matters the testimony of the parties was diametrically opposed each to the other. It was the province of the jury, under proper instructions given them, to determine the questions of fact. Their verdict was approved by the trial judge who saw the witnesses and heard them testify, and we would not be justified in reversing the judgment rendered thereon, and therefore affirm it.

Judgment affirmed.

219 I.A. 658



General No. 7126.

Ag. 7.

April Term A. D. 1920.

Frank Hass, administrator of the estate of
Bertha Hass, deceased,
Defendant in error.

vs.

2191.A. 658

Walker D. Hines, Director General of Railroads,
Plaintiff in error.

Error to the Circuit Court of Vermilion County

WAGGONER, P. J.

This is an action on the case brought to recover damages for the death of Bertha Hass. The jury returned a verdict finding the issues for the defendant in error, assessing the damages at \$5,000.00, and a judgment was entered on the verdict.

Bertha Hass killed on January 28, 1918, while riding in a buggy which was struck by a passenger train on the Chicago & Eastern Illinois Railroad Company's tracks at their intersection with Henderson Avenue, in Rossville, Illinois. The facts and pleadings are substantially the same in this case as in that of Frank Hass, administrator of the estate of Ernest Hass, deceased, v. Walker D. Hines, Director General of Railroads, in which an opinion was filed at the present term of this court. Most of the questions presented in this case were fully considered in the last named case, and what was said in such opinion applies to this case as well.

(Page 1)

It is urged that negligence of Ernest Hass, who was driving with the consent of his mother, should be charged to her. The eighth instruction, given at the request of plaintiff in error, so told the jury and, as there was nothing contradictory to it in any other instruction, there can be no error of which complaint can be made. The complaints made in reference to the admission, and to the exclusion of evidence, by the court, or to the argument of counsel are not well taken and not of sufficient importance to be discussed in detail here. The deceased was forty-two years of age, in good health and a good housekeeper. She left a husband, to whom she had been married twenty-two years, and four children, aged nineteen, thirteen, twelve and ten years respectively. The damages awarded were, under such circumstances, reasonable and far from being excessive.

The judgment rendered in the circuit court is affirmed.

Affirmed.

(Page 2)



General No. 7146

Agenda No. 13

April Term A. D. 1920.

The People of the State of Illinois, Defendant in Error

vs.

Williams Evans, Plaintiff in Error

Error to the County Court of Sangamon County

WAGGONER, P. J.

1420a)
219 I.A. 658

On October 4, 1918, an information was filed in the county court of Sangamon county, Illinois, verified by George H. Faxon, a deputy sheriff of that county, charging the plaintiff in error with having unlawfully sold intoxicating liquor, at different times in the Town of Capital, while said town was anti-saloon territory.

No jury had been drawn and summoned prior to the first day of the term of the county court at which this case was tried. An objection was interposed by Dr. John A. Wheeler, who is designated as being an interested party, to the service of a venire in the case either by the sheriff or coroner of said county, and thereupon the court ordered that a venire for thirty-six persons be issued and delivered to John A. Richardson to be by him served. The venire was served, and when thirty-six jurors appeared in court plaintiff in error interposed a challenge to the array of jurors, and the challenge was by the court denied. A motion was then made by

Page 1

plaintiff in error for a change of venue on account of prejudice of the presiding judge. The motion was overruled. Afterwards a jury was selected from the jurors summoned, a trial had, a verdict returned finding plaintiff in error guilty, and a judgment was rendered on such verdict from which judgment this writ of error is prosecuted.

In the case of People v. Mankus, 292 Ill. 435, an information was filed in the county court of Sangamon County and, the same proceedings were had in that case in regard to obtaining a jury and the same questions presented in reference thereto as are now presented in this case. In reviewing the Mankus case the Supreme Court said: "Section 110 of the statute relating to juries for the law terms of county courts (Hurd's Stat. 1917, p. 878,) provides in the first clause that "unless the court shall otherwise order," the jury shall be drawn and summoned in the same manner provided for



drawing and summoning juries for the circuit court. When a jury is not summoned in that manner it is the duty of the court, on the first day of the term, to call all cases on the docket and ascertain whether a jury will be required. If one is demanded by any party to a suit or the State's attorney in any criminal case, the court shall set such case or cases for trial and direct the clerk to issue a venire for twelve competent jurors and deliver the same to the sheriff or coroner, who shall summon such jurors from

Page 2

the body of the county. In case the sheriff, coroner or bailiff be intersted in any jury case pending, or in case anybody interested, or any attorney, objects to the sheriff, coroner or bailiff summoning the jury, if the court thinks the objection reasonable he shall appoint an impartial bailiff to summon the jury. It is undeniable that the statute was not followed in summoning the jury. Under the statute the jury is to be drawn and summoned in the same manner as juries in the circuit court unless the court otherwise orders. The county court is given authority to order the jury drawn and summoned in the same manner juries are drawn and summoned in circuit courts, but if the court does not so order it has authority to "otherwise order a jury." The common law powers of courts to provide juries is subordinate to the methods expressly provided by statute, and where there is such a statute it is not to be departed from but must be substantially complied with. (*Healy v. People*, 177 Ill. 306.) While it has been often held such statutes are directory, that a substantial compliance with their requirements is sufficient and that a mere irregularity will not be fatal, that is only so where an attempt has been made to follow the statute and there has been some irregularity in doing so. *Murphy v. People*, 37 Ill. 447; *Wilhelm v. People*, 72 id. 468; *Mapes v. People*, 69 id. 523; *Siebert v. People*, 143 id. 571 are typical cases where it was held a mere irregularity in providing a jury will not render it invalid. Here

Page 3

no attempt was made to get a jury by either of the methods provided by section 110, but the jury was drawn and summoned in a manner not mentioned or referred to by the statute. * * * Courts have been very liberal in excusing mere irregularities where an attempt has been made to comply with the

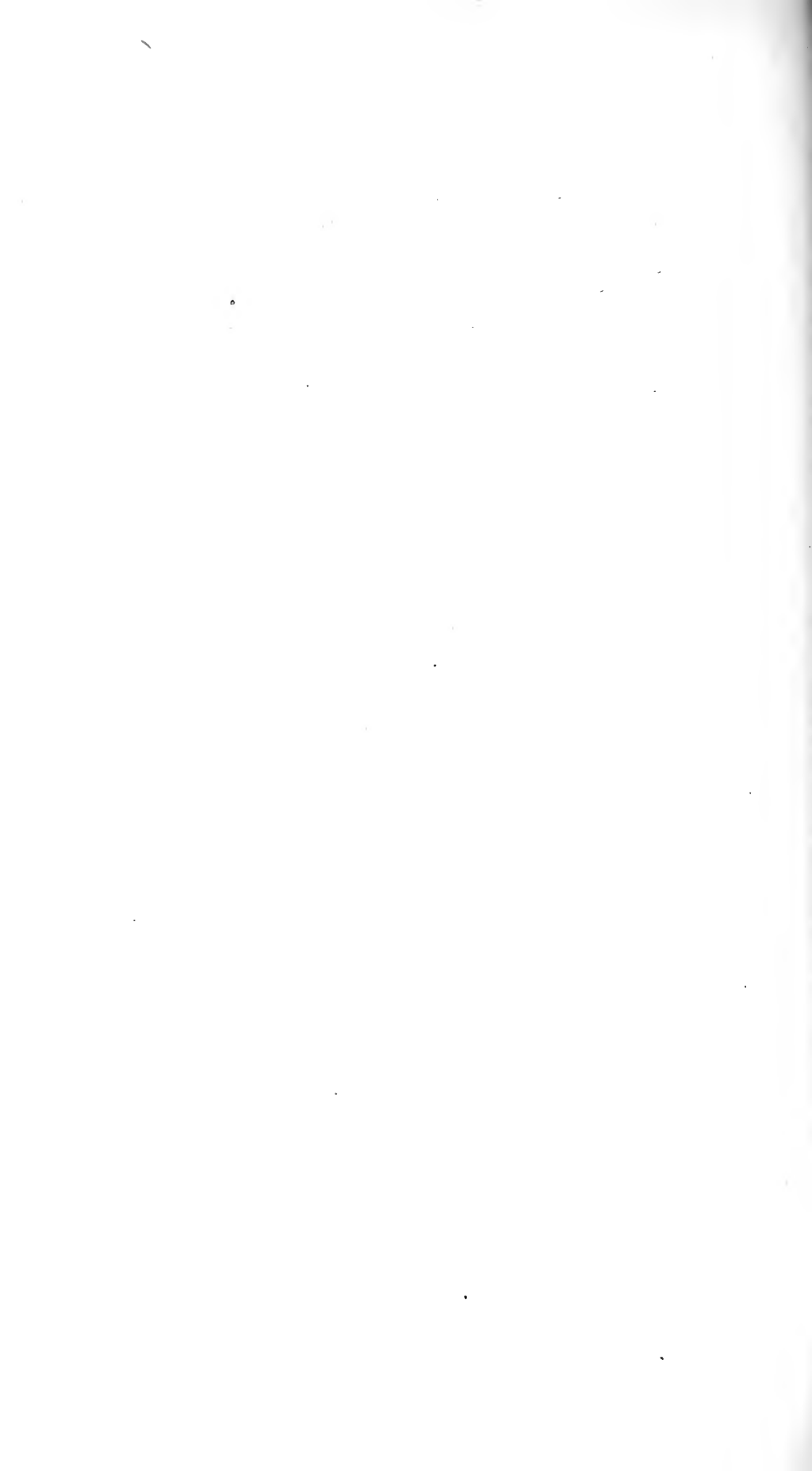
law in providing juries, but they cannot hold valid and legal a jury where no attempt has been made to select it in accordance with the requirments of the statute."

No error was committed in denying the motion for a change of venue, but the challenge of the array of jurors should have been sustained.

The judgment of the county court is reversed and this cause remanded.

Reversed and Remanded.

Page 4



General No. 7165.

Agenda No. 30.

April Term, A. D. 1920.

Harry J. Clark, Appellee,

vs.

Walker D. Hines, Director General of Railroads,
Appellant.

Appeal from the Circuit Court of Morgan County.

1427a
219 I.A. 658

WAGGONER, P. J.

On September 8, 1919, appellee shipped a car load of hogs weighing about twenty thousand pounds over the Chicago & Alton Railroad from Jacksonville, Illinois, to the Union Stock Yards at Chicago. The train upon which the stock was shipped was an extra stock train, operated by train orders without time card rights, that started at Roodhouse, Illinois, on Monday and Wednesday of each week for the purpose of carrying livestock to the Chicago market. It usually reached its destination between five and seven o'clock A. M. On the day in question the train left Jacksonville about eleven o'clock A. M. and arrived at the Union Stock Yards at twenty minutes of eleven the next morning. The train was made up of dead freight when it left Roodhouse, but en route cars containing such freight were set out and cars of live stock substituted so that at Bloomington it consisted of about the same number of cars, but most of them contained live stock. The evidence showed that the usual and customary time for the arrival of this train at Brighton Park,

Page 1

a station within two or two and a half miles of the stockyards chutes, to be between four and seven o'clock A. M., and it arrived there at 6:15 or 6:30 A. M., so that a little more than four hours elapsed between that time and the time the train was at the place to deliver the stock.

The court properly admitted evidence offered by appellant for the purpose of accounting for all delays, complained of by appellee, between Jacksonville and Brighton Park but erroneously refused to admit evidence offered for the same purpose from the latter place to the Union Stock Yards, and thereby deprived appellant of a part of his defense.

The shipment was made under a contract which provides that the carrier does not agree to deliver the stock at destination at any specified time nor for any



particular market, but the law requires the carrier to use reasonable diligence to transport such stock within a reasonable time. Whether or not appellant used reasonable diligence in transporting the stock was a question of fact to be determined by the jury, from all the facts and circumstances, under proper instructions as to the law.

If it should be assumed that there was a delay in the transportation of the stock, "mere delay is not sufficient to create liability. To create liability, the delay must result from some

Page 2

negligence or want of diligence on the part of the carrier. It must be an unreasonable delay under all the circumstances of the particular case." (St. Louis Merchants Bridge Terminal Ry. Co. v. Tassey, 122 Ill. App. 339). In order for the jury to determine whether or not the delay in getting from Brighton Park to the Union Stock Cards was unreasonable or the result of some negligence or want of diligence on the part of appellant, they should have been permitted to have heard all competent evidence, offered by appellant, as to the reason for such delay. The evidence showed that the train carrying the stock was a little more than four hours in going two or two and one-half miles without any explanation on the part of appellant whose evidence offered for that purpose was excluded.

The court, on behalf of appellee, instructed the jury that "as a matter of law, that if live stock is placed with a common carrier for transportation, and the same is not delivered in the usual and customary time; or in accordance with schedule time of the railroad company, if such schedule time is shown by the evidence, the presumption is that such delay in delivery, was occasioned by the fault and negligence of such carrier, and the burden of proof is on the carrier to show that such failure of delivery, if any, was occasioned from causes for which the carrier was not responsible."

The jury were told, by this instruction, that if the stock

Page 3

was not delivered in the usual and customary time * * * the burden of proof was on appellant to show that such failure of delivery was occasioned by causes for which he was not responsible, and appellant was not permitted to make the proof required of him

under it. In addition to that, the court refused to give an instruction, offered by appellant, telling the jury, "that although you may believe from the evidence that a longer time was consumed in carrying the car of hogs in question from Jacksonville to its destination in Chicago, than was usual and customary for like shipments, yet if you also believe from the evidence that said delay was brought about **through no fault of the defendant Director General but the same was without negligence on his part**, you cannot hold said Director General liable for any loss or damage to plaintiff's hogs as a result of such delay."

To have given this instruction would have availed appellant nothing under the evidence, but it correctly states the law (St. Louis Merchants Bridge Terminal Railway Co. v. Tasse, 122 Ill. App. 339; Bacon v. C. C. & St. L. Ry. Co., 155 Ill. App. 40), and if competent evidence had not been excluded and this instruction had been given, the result of the trial might have been a verdict in his behalf.

There is no evidence that the train had a schedule time, but the uncontradicted evidence is to the contrary, and no instruc-

Page 4

tion should have been given based on the assumption that it did have, as was done in appellee's second and fifth instructions. In the latter instruction the assumption is that "the schedule time for the arrival of the car (containing the hogs) would be the following day at Chicago Stock Yards, in time for hogs to fill and be on the early market." There is no requirement of law that the hogs should be delivered in time to be fed and watered before the market opens. This instruction also makes appellant liable if the jury believes from the evidence that the hogs were negligently reduced in weight, notwithstanding the record contains no evidence of any reduction of weight. Neither of these two instructions of appellee should have been given.

Appellant's brief does not contain a single reference to the abstract. We would be justified in affirming the judgment pro forma, but have considered the case and reverse the judgment of the trial court, for the errors above indicated, and remand the cause.

Reversed and Remanded.



General No. 7169

Agenda No. 34

April Term A. D. 1920.

W. H. Schramm, Appellee

vs.

2191A. 659

W. D. Hines, Director General of Railroads, Appellant

Appeal from the Circuit Court of Ford County

WAGGONER, P. J.

This is an action brought by appellee to recover for damages done his automobile by reason of its having been struck by an east bound train of the Toledo, Peoria & Western Railroad Company on a crossing at Sixth street, in Fairbury, Illinois.

The declaration charges appellant with negligence in operating its train; with failure, to give the statutory signals when approaching the crossing, and with permitting buildings, a tree and box cars to stand on the right of way, and running a train knowing such buildings, tree and box cars obstructed the view of persons approaching such crossing.

It is conceded that no buildings were on the right of way and the jury were so instructed.

On the day of the accident, appellee, together with Gotfrey Weibel and Andrew Steidinger, drove from Forrest west to Fairbury in appellee's automobile. These towns are six miles apart. The

Page 1

railroad passes through both of them and for five miles its track and the road over which appellee drove run parallel. A passing train could be seen from any point along that portion of the wagon road. Appellee undoubtedly knew that no train had gone east from Fairbury while he was going west to that place.

After getting to Fairbury appellee turned from Locust street south, on Sixth street, a block from the place where the accident occurred. The evidence shows that a person standing on Sixth street at a point one hundred and twenty-two feet south from Locust street can see west along the railroad track three hundred feet and can see one hundred and fifty feet of the track, and that at a point twenty-nine feet north from the place where the accident occurred can see three hundred feet west up the track. The train in question was due at Fairbury at 9:16 A. M. and was about twenty minutes late. The railroad station is two and a half blocks west

from Sixth street. The train was to stop at a water tank nine hundred feet east from the Sixth street crossing, and at the time of the accident was running from eight to ten miles an hour. Appellee, who formerly was a fireman on the Lake Erie & Western Railroad, testified that as he approached the crossing he talked with the men that were in the car with him about it, and said it was a dangerous crossing, that one of them looked at this watch and said that the

Page 2

train had gone; that he was driving along looking ahead, paying attention to the running of his car, and when he got to the track glanced up and saw the train not over seventy feet from him; that he pressed down the clutch, threw off the spark, put the emergency on in full force, and killed the engine while his car was on the main track. He had owned the car twelve or fourteen days, had driven it about one hundred and fifty miles, and had owned no other car. It is evident that by reason of his lack of experience in running a car he was giving it attention to the exclusion of proper attention to the approaching train and as a result an accident happened which could have been avoided by the exercise of ordinary care on his part. The three men jumped from the car. One of them ran around behind it, while it was standing on the crossing, and tried to push it off but could not do so on account of the brakes being set.

Appellee testified that the bell on the engine was not ringing until after the car was struck when the bell rang continually. His idea seems to be that one of the enginemen started the bell to ringing after the accident. He says nothing in reference to whether or not the whistle was sounded. Gotfrey Weibel, called by appellee testified that he did not hear the bell or whistle until the train was within a rod or so from the car; that he heard the bell ringing and the whistle sound about the same time. Andrew Steidinger testi

Page 3

fied that he heard neither whistle or bell at any time. Appellant showed by trainmen, passengers and a resident of Fairbury, who was standing at the Seventh street crossing and saw the accident, that the whistle was sounded for the street crossing one block west of Sixth street and that the bell was ringing for some distance before the train reached the place of accident.

In order to recover in this case, it was incumbent upon appellee to establish either that he himself was in the exercise of due care, or that the collision was in no degree attributable to a want of proper care on his part. (Blanchard v. Lake Shore & Michigan Southern Ry. Co. 126 Ill. 416). The driver of an automobile must use reasonable care in crossing railroads tracks to avoid collision with trains, and a failure so to do is such negligence as will preclude a recovery for damages sustained in a collision. (22 Ruling Case Law pg. 246.)

We find, as ultimate facts, from the record in this case, that appellee was not in the exercise of ordinary care at the time and place of the accident, and that negligence, on his part, and such lack of ordinary care contributed to the collision which resulted in the damages complained of and for that reason he is not entitled to recover.

The judgment of the trial court is reversed.

Reversed with a finding of facts.

7176
General No. 7176

1427a
Agenda No. 40

April Term, A. D. 1920.

J. C. Utter, for the use of Emma Brown, Appellant

vs.

J. Will Snyder, Executor of the last will and testament of Cornelia H. Jacobs, deceased, Appellee

Appeal from Circuit Court of Edgar County.

WAGGONER, P. J.

219 I.A. 659

On December 14, 1916, Emma Brown recovered a judgment in the circuit court of Edgar county for \$2300.00 against J. C. Utter, who at that time was also indebted to Edgar County National Bank, William S. Logan and Cornelia H. Jacobs but was not indebted to Frank F. Hager. Immediately after the rendition of the judgment in favor of Emma Brown, J. C. Utter had each of his three remaining creditors take a judgment, by confession, against him on notes held by them. The judgment of Edgar County National Bank was for \$939.06. An execution was issued on the judgment of Emma Brown, placed in the hands of the sheriff of Edgar county, and by him returned "no property found."

The judgments of William S. Logan and Cornelia H. Jacobs were paid. Cornelia H. Jacobs, a sister of J. C. Utter, died leaving a will in which he was named as a residuary legatee, and appellant, J. Will Snyder, nominated as executor of such will.

Page 1

Immediately after the death of his sister, J. C. Utter executed and delivered to Frank F. Hager the following instrument: "Jan. 4, 1918. For a valuable consideration, the receipt of which is hereby acknowledged, I hereby assign all the interest which I may have as an heir or legatee of Cornelia Hall Jacobs to Frank F. Hager and authorize him to receipt for any monies coming to me from said estate. In witness whereof I have hereunto set my hand and affixed my seal at Paris, Illinois, the day and date above written. James C. Utter."

Frank F. Hager died. Appellant instituted this garnishee proceedings against appellee. Robert N. Parrish, as administrator of the estate of Frank F. Hager, deceased, and J. C. Utter filed an intervening petition alleging among other things, an indebtedness of the latter to Edgar County National Bank for which judgment



had been taken in favor of said bank, for \$936.06; that on Jan. 4, 1918, Frank F. Hager was the cashier of said bank; that he died intestate on October 30, 1918, and said Robert N. Parrish was duly appointed administrator of his estate; that the assignment hereinbefore quoted was made to Frank F. Hagar as collateral security for the amount owed to Edgar County National Bank; that there is now in the hands of appellee \$605.82 due J. C. Utter as a residuary legatee and held by virtue of an order of final distribution entered in said estate by the county court, that should be paid to Robert N. Parrish, as administrator of the estate of Frank F. Hagar, deceased.

Page 2

The garnishee answered that he had \$605.82 assigned by J. C. Utter to Frank F. Hager and held in pursuance of an order of distribution entered in the estate of Cornelia H. Jacobs, deceased. Issue was joined and a hearing by the court had.

J. C. Utter testified that he made the assignment to Hager as security for the judgment of the Edgar County National Bank; that prior to making such assignment he had deeded to Hager to secure an indebtedness to said bank of \$900.00, upon which judgment was afterwards taken, a ranch in Montana worth \$15,000.00 with an incumbrance upon it of \$5500.00; that about six months after the assignment was made Hager deeded the land back to him.

Emma Brown incurred Utter's ill-will by taking judgment against him and he said to her attorney and afterwards told Snyder, the executor of his sister's will, that she (Emma Brown) would be the last one to get her money. The evidence shows he wanted to avoid paying her debt and the making of the assignment was a shift or device to avoid having his distributive share of the estate applied to the payment of her debt and was a fraud on her.

The assignment was absolute on its face and if really intended as security for a debt might have been valid as between the parties to it but is fraudulent and void as to creditors. *Best v. Fuller & Fuller Co.*, 185 Ill. 43.

Page 3

J. Will Snyder was summoned as a garnishee, not individually, but as executor of the last will and testament of Cornelia H. Jacobs, deceased, and judgment was entered against him individually for \$605.82 in fav-

or of Robert N. Parrish, administrator of the estate of Frank F. Hager. Under the evidence no judgment should have been rendered in favor of such administrator, and especially not a personal judgment against Snyder.

For the errors above indicated the judgment is reversed and cause remanded.

Reversed and Remanded.

Page 4

General No. 7188.

Agenda 49.

April Term, A. D. 1920.

R. L. Gibbs, Appellee.

vs.

William D. Rohl, Appellant.

Appeal from the Circuit Court of Champaign County.

WAGGONER, P. J.

This suit was instituted before a justice of the peace and by appeal taken to the circuit court of Champaign county. A transcript was filed in the office of the clerk of said court on May 22, 1919, and the suit placed on the docket for the next term of court. The record shows that on Sept. 29, 1919, the court, without any motion made by appellee, dismissed the appeal for want of prosecution, ordered that a writ of procedendo be issued, and rendered judgment against appellant for cost in the circuit court. The next day appellant, by his attorney, entered a motion to set aside the order dismissing the appeal, and the motion was denied.

Sec. 21, Chapter 110 Hurd's Revised Statutes 1917, provides that "no suit, action or proceeding * * * shall be dismissed for want of prosecution at any time except when such cause shall be actually reached for trial in its order as set for trial." This cause had not been set and afterwards reached for trial. The court erred in dismissing the appeal. The case should have been set for trial and when reached in its order, if no one appeared for the appellant, on a motion

Page 1

made by appellee, at that time, to dismiss the appeal for want of prosecution the same could properly have been allowed.

Judgment reversed and cause remanded.

Page 2

1431a)

Gen. No. 7201.

Ag. 61.

April Term, A. D. 1920.

Frank Meshikis, Appellant

vs.

Springfield Consolidated Railway Company,

Appellee.

219 I.A. 659

Appeal from Circuit Court of Sangamon County.

WAGGONER, P. J.

Appellant, while upon the running board of an automobile, was injured by reason of a collision between the automobile and a street car of appellee, near the intersection of Sangamon Avenue and Peoria Road, in the City of Springfield, Illinois.

The declaration, consisting of one count, charges appellee with negligence in starting its car at a time when the automobile was being driven across the tracks in front of and close to the car. Reliance is had, for a recovery in this case, upon one specific charge of negligence which would have to be supported by the greater weight of the evidence.

The evidence shows that, at the time of the accident, the street car was headed northeast; that a tractor was headed in the opposite direction; that the space between the street car and the tractor was from seven to ten feet and that the driver of the automobile attempted to drive between them.

It is the contention of appellant that neither the street

Page 1

car nor tractor were in motion but both were standing; that the automobile, going at a rate of four or five miles an hour, was driven upon the street car track; that the street car was started, struck the automobile, injured appellant and threw the automobile against the tractor.

It is contended by appellee that when the driver of the automobile went to pass between the street car and tractor, neither of them were standing but both were in motion; that the automobile was being driven at a rate of between fifteen and twenty miles an hour; that the automobile ran into the tractor and skidded over on to the street car track; that an approaching street car, which had not reached the place for it to stop at the intersection of the avenue and street above mentioned, struck the automobile and the injuries complained of

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were in that manner inflicted.

The contentions of each of the parties were supported by witnesses called by them respectively and two different accounts given of the way in which the accident happened. The jury, by their verdict, found appellee not guilty of negligence and in order so to do must have believed its witnesses. We cannot say the verdict was against the weight of the evidence but believe it to be supported by the evidence. The record is not free from error but contains none sufficient to justify a reversal of the judgment and the judgment must, therefore, be affirmed.

Judgment affirmed.

Page 2

14322

General No. 7205

Agenda No. 67

April Term, A. D. 1920

Aaron E. Larch, administrator of the estate of
James R. Larch, deceased Appellee

vs.

J. A. Judy and C. J. Tucker, partners doing
business as Judy Wholesale Candy Co., Appellants

2191.A. 659

Appeal from the Circuit Court of Macon County.

WAGGONER, P. J.

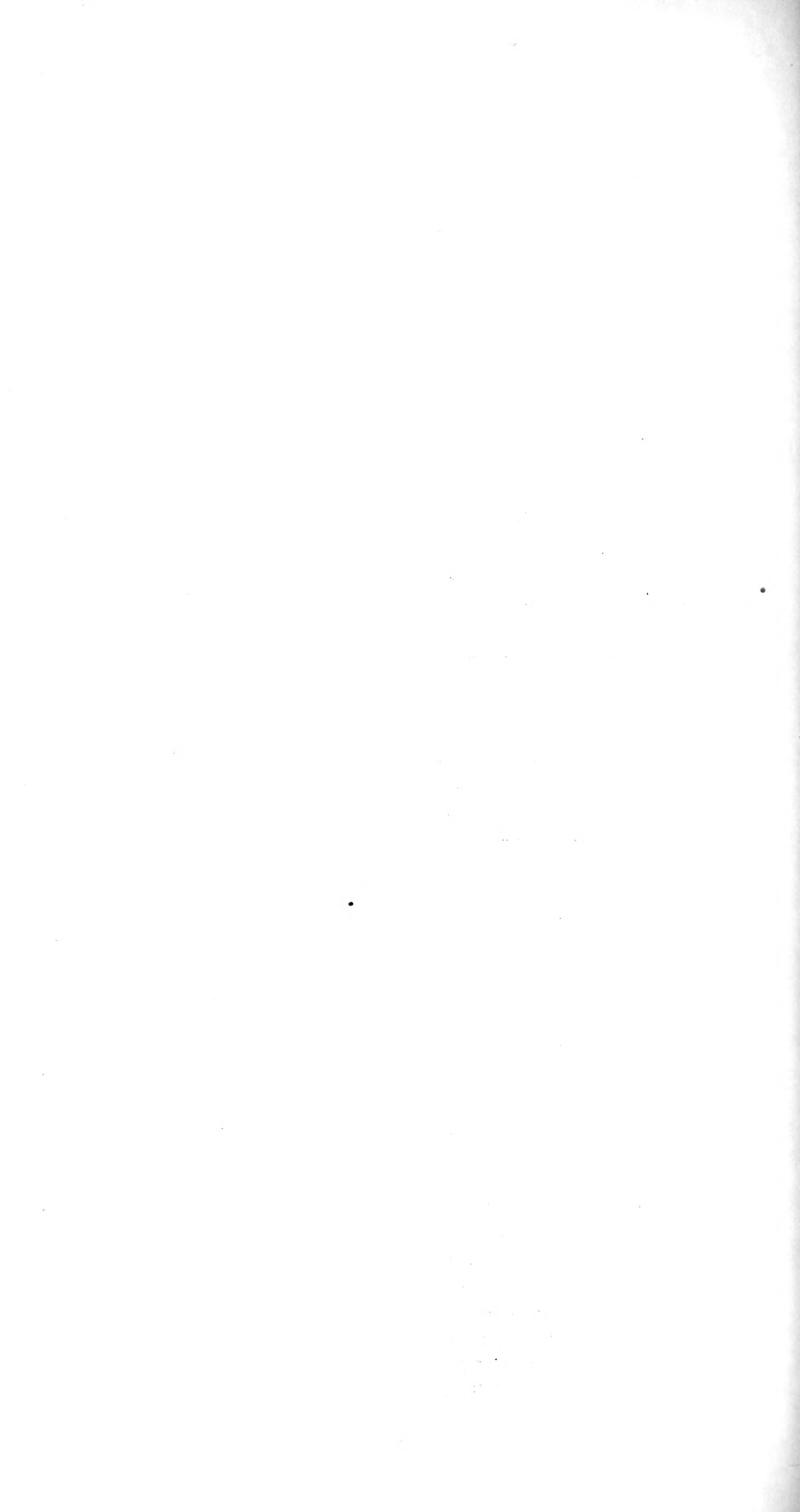
Appellee brought this action to recover damages for the death of his son, who was killed by a truck driven by an employee of appellants on a public street in Decatur, Illinois, and obtained a judgment for four thousand dollars and cost. The declaration, containing five counts, charges appellants with willful and wanton negligence; with negligent and careless operation of the truck; and with violations of the statute in regard to speed.

Appellants insist that negligence, on their part, and due care on the part of those in charge of the decedent was not established; that if any negligence was proven it was not the proximate cause of the injury; that there is no evidence of wilful and wanton misconduct, and that the verdict is manifestly against the weight of the evidence.

Water Street, in Decatur, runs north and south crossing

Page 1

Marietta Street at right angles. There is a street car track on Water Street and Marietta Street has a car line running west from the west side of Water Street. The first street north from Marietta Street, running parallel therewith, is Orchard Street. James R. Larch was run over and instantly killed at a point on the west side of Water Street about twenty feet north of the north line of Marietta Street just after noon on a bright clear day. Appellant's truck was being driven by their employee Arnold Judy, a boy seventeen years old and the son of one of the appellants. The truck was a two-ton Republic truck, and was being driven south on the west side of Water Street at the time it ran over the boy. Arnold Judy testified that when he was at the Orchard Street intersection he saw the decedent standing on the curb on the east side of Water Street, but



that he did not see him leave the curb and start across the street; that the street car went south on Water Street and passed him about twenty-five feet north of Marietta Street; that he was about five to seven feet behind the street car at the point of the accident; that he next saw the boy squarely in front of his truck; that the boy came from behind the street car; that he was driving about two feet from the west curb and from "eighteen to ten miles per hour" as he came south on Water Street from Orchard Street to where he collided with the boy at Marietta Street. Water Street is about fifty feet wide.

Page 2

It would have been physically impossible for this accident to have occurred in the manner that Arnold Judy describes it in his testimony. That the little boy could have darted behind a street car that was running at a rate of speed slightly in excess of the truck and passed behind the street car and across the rest of the street in front of the truck, which was only two feet from the west curb and from five to seven feet behind the street car and running at least ten miles an hour, is absolutely impossible. No sensible jury would believe such a story or attach much weight, if any, to the evidence of the seventeen year old boy who told it to free his father and employee from financial liability for this awful accident, caused, as the evidence shows, by the willful and wanton disregard of his duty and the rights of pedestrians on the street. His testimony is of the most damaging character and must have settled conclusively, in the minds of the jury, all questions of fact.

Appellants called two other witnesses who saw the accident. Their testimony is at fatal variance with that of Arnold Judy, and they differ materially between themselves.

Appellee proved his case by three eye witnesses and four others who were present at the place of the collision immediately before or after it occurred. From the testimony of appellee's witnesses it satisfactorily appears that the truck was being driven at the rate of about eighteen miles an hour at the time it struck

Page 3

the boy. The noise of the collision was heard at some distance. The truck was going so fast it turned the boy end over end when it struck him, and when his body hit the pavement the truck struck his feet, turned him and struck his head.

It is unreasonable to argue, in the face of this record, that Arnold Judy was driving slowly and with due care. The very thing that attracted the attention of two of the witnesses was the high rate of speed at which he was going. After Judy struck the body he ran on across Marietta Street before stopping. Appellee's evidence directly contradicts the proposition that a street car passed at the time in question, and we find from a preponderance of the evidence that no street car did pass the truck on Water Street as claimed by Arnold Judy.

Without proceeding further to set out the evidence, we deem it sufficient to say that the negligence of appellant's was clearly established by the greater weight of the evidence, and that Arnold Judy was driving at a high and dangerous rate of speed. Appellant's attorney's admit, in their brief, that Water Street at the point of the accident is a much traveled street. That fact is clearly proven and the evidence is such that the jury may have justly found that the conduct of Arnold Judy in driving the truck at the high and dangerous rate of speed he did drive it through a much traveled street amounted to willful and wanton misconduct.

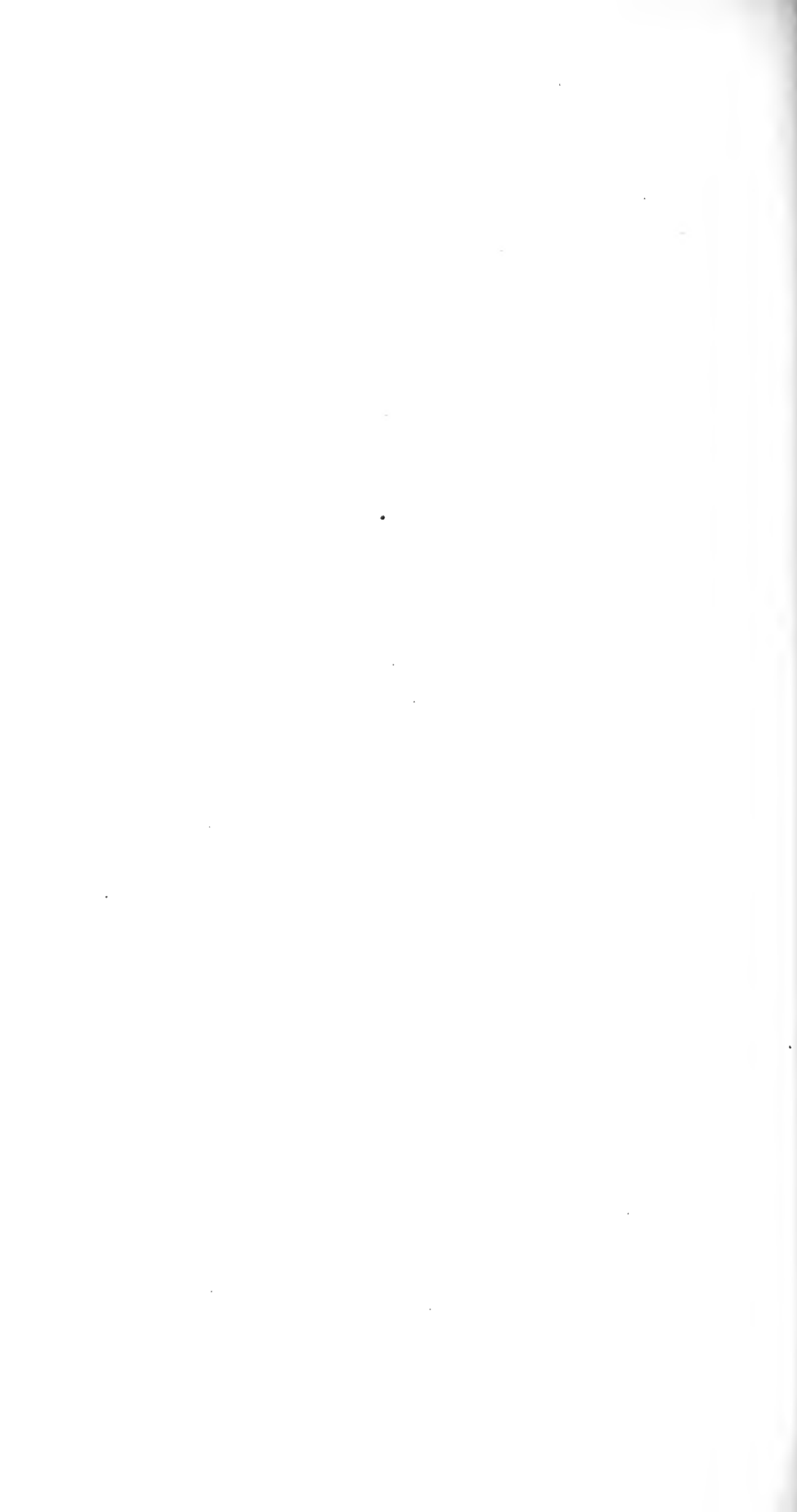
There is also ample evidence in the record to justify the

Page 4

jury in finding that those in charge of the boy were in the exercise of due care for his safety, and it is idle to contend that the negligence of appellants was not the proximate cause of the injury.

It is claimed that Arnold Judy was not in the line of his duty at the time of the accident. Appellant C. J. Tucker testified that at the time of the injury Arnold Judy was in the employ of appellants and in the discharge of business for the firm with the truck in question and on his way from luncheon to their place of business. No special plea was filed denying the relationship of master and servant or that appellants were operating and in control of the truck that caused the injury, and therefore such relationship is admitted. *Union Traction Co. v. Jerka*, 227 Ill. 95, 99; and *Kieshowski v. Bastrom*, 179 Ill. App. 73, 79. Even if the point were not waived there is no merit in it. *Rainford v. Chicago City Ry. Co.* 239 Ill. 427, 430-431.

The findings we have made relative to the facts pertaining to negligence, speed, willful and wanton misconduct eliminates most of the contentions made in re-



gard to the admission and exclusion of evidence and instructions.

The evidence in regard to the skid tracks was excluded on appellant's motion and the jury instructed to disregard such evidence. We cannot think that the fountain of justice was poisoned by showing the jury the blood of the little boy in the street and the skid marks

Page 5

as appellant's counsel argues. If the fountain of justice was poisoned in this case it was by the testimony of Arnold Judy. There were no rulings relative to the skid marks that were prejudicial to the appellants. The objection urged in reference to the cross examination of Ethel Hodges and the direct examination of Walter Turner are of no consequence and could not have harmed appellants. The trial court was very liberal towards appellants in all his rulings. It is complained that Arnold Judy was asked, on cross examination, if he had a chauffeur's license. No objection was made until after the question had been answered, and no motion was made to strike out his answer. We do not consider it error, under this record, and in any event it could not have been harmful.

The instruction on due care given at the request of appellee was correct, and as appellants had given an instruction on the same subject to the same effect, there could be no error of which they could complain. All of appellant's refused instructions were fully covered by other instructions that were given.

It is finally claimed that the damages are excessive. The boy was in good health, almost six years old, and ready to start to school. He was an only child and left a father and mother as his next of kin. The verdicts were held to be not excessive in each of the following death cases. United States Brewing Co. v. Stolenberg, 211 Ill. 531. Boy was four years old and the verdict was \$5000.00.

Page 6

Calumet Electric Street Ry Co. v. Van Pelt, 173 Ill. 70. Girl was nine years old and the verdict was \$5000.00 Swan v. Boston Store, 177 Ill. App. 349. Boy was five years old and verdict was \$10,000.00 Chicago City Railway Co. v. Strong, 129 Ill. App. 511. Boy was six years old and the verdict was \$5000.00 Chicago City Railway Co. v. Reddick, 139 Ill. App. 161. Boy was two years old and the verdict was \$6000.00 Cicero and Proviso Street Ry Co. v. Boyd, 95 Ill. App. 510. Boy was sev-

en years old and verdict was \$5000.00 Halbert v. Louisville and Nashville Railroad Co., 186 Ill. App. 508. No evidence in regard to the death of a four year old girl was offered and the verdict was \$3000.00 Grayhek v. Stearn, 154 Ill. App. 385. Girl was four years old and verdict was \$3000.00.

In Chicago City Railway Co. v. Strong, 129 Ill. App. 511, 516-517, the court said, "It has been decided that such damages cannot be limited by any fixed rules and must be left largely to the sound discretion of the jury. Chicago and Alton Railway Co. v. Shannon, 43 Ill. 338. The amount of the recovery in this case is the maximum allowed by law at the time the boy died. He was an ordinary bright boy, but too young to judge of his final attainments in the 'battle of life.' He was an American youth and every ambition of life was open to him, and fame and distinction and high place, in this free republic, were not barred to him. The country's

Page 7

history is replete with names which shine luminous upon the scroll of fame, who climbed the giddy heights of prominence and usefulness as the reward of strenuous and patriotic endeavor from as humble a station in life as that to which the deceased was born. What comfort and financial support he might have been to his next of kin we can never know. What sorrow or charge upon them he might have become is equally denied. He who was the tanner's son lived to make that father a postmaster, and many snug and lucrative offices were bestowed upon many of his kin. Therefore no one may know what actual damage the next of kin have suffered, and there is no class distinction or advantage of heredity here, all are on an equal plane, and the damages must be admeasured within the limitations of the statute, and of necessity what the amount shall be largely rests in the discretion of the jury."

In comparing the present and past verdicts for similar personal injuries, the difference in the purchasing power of money, or in other words the increase or decrease in the cost of living at the present time as compared with such power at the time the prior awards were made, may be taken into consideration. 3 Am. Law Rep. 610.

The judgment of the circuit court is affirmed.

Judgment Affirmed.



General No. 7100.

Agenda No. 2.

April Term, A. D. 1920.

George O. North, Appellant,

219 I.A. 660

vs.

Henry Mahannah and Charles Mahannah,

Appellees.

219 I.A. 660

Appeal from Circuit Court, Macon County.

ELLDREDGE J.

George O. North, appellant, filed a bill in Chancery in the Circuit Court of Macon County to foreclose a mortgage assigned to him by the Mutual Benefit Life Insurance Company, and executed by Henry Mahannah and his wife to secure a loan evidenced by a promissory note for the sum of \$14,000.00. Henry Mahannah, his wife and Charles Mahannah were made parties defendant to the bill. The lands embraced in the mortgage consisted of 210.56 acres. Henry Mahannah, appellee, filed a cross bill. Answers were filed to the original and cross bills, and the cause was heard upon exceptions to the report of the Master in Chancery. From the decree rendered, George O. North, complainant in the original bill, appealed to this court and Henry Mahannah, complainant in the cross bill, appealed to the Supreme Court. The issues and the facts are fully set out in the opinion rendered by the Supreme Court on the appeal to that court (Mahannah vs. Mahannah, 292 Ill., 133) and that opinion disposes of all the questions involved on the appeal to this court.

Page 1

The decree of the Circuit Court, in so far as it involved the issues presented by the original bill, is affirmed.

Page 2



14342

GENERAL NO. 7139.

AGENDA NO. 8.

APRIL TERM, A. D. 1920.

E. R. Kirgan, Defendant in Error,

vs.

Warren C. Fairbanks, Plaintiff in Error:

2191A. 660

Error to the Circuit Court, Greene County.

ELDREDGE, J.

This is a writ of error sued out to review a judgment for \$1,162.50 in an action of assumpsit rendered in the Circuit Court of Greene County in favor of defendant in error and against plaintiff in error.

The first count of the declaration avers in substance that Kirgan, plaintiff in the suit, was on January 1, 1915, a tenant of the defendant, Fairbanks under a written lease for one year of certain lands situated in Bluffdale Township in Greene County, Illinois, and said lease was to expire by the terms thereof on or about March 1, 1915; and whereas after March 1, 1915, the defendant was desirous of releasing said lands to the plaintiff for another year from and after March 1, 1915, and offered to lease the same to the plaintiff, but the plaintiff declined to lease said lands because they were not properly drained and the defendant, in order to induce plaintiff to lease said lands, orally

Page 1

promised said plaintiff and orally agreed that if he, the plaintiff, would enter on said lands and plant corn and other agricultural products thereon during the cropping season of 1915, he, the defendant, would construct or cause to be constructed drainage ditches on said lands to properly and completely drain the same so that the crops planted thereon during the said year would not be harmed by water; and the plaintiff, relying upon said promise and in consideration thereof, entered upon said lands in the spring of 1915 and planted and cultivated the same and did everything he was required to do by the terms of his oral lease and agreement, yet the defendant did not comply with his agreement to construct said ditches but wholly failed to do so by reason whereof, surface water came upon said lands in 1915 and totally destroyed the corn crop thereon, then and there the property of the plaintiff, and damaged the same to the amount of \$5,000.00, etc. The second count is substantially the same as the first with the exception that it declares upon an



oral lease made between the plaintiff and defendant for the year commencing March 1, 1916, and ending March 1, 1917. The third count comprised the common counts.

Warren C. Fairbanks, plaintiff in error, in 1914 owned a number of acres of land in Greene County which he leased out in parcels to different tenants. The entire tract of land is commonly referred to

Page 2

in the testimony as "The Ranch." In 1914, W. D. Fairbanks, was the superintendent of this Ranch. In that year, on the first day of March, E. R. Kirgan, defendant in error, and said Warren C. Fairbanks, by W. D. Fairbanks his agent, executed a written lease demising about one hundred acres of land to Kirgan for a term of two years commencing on the first day of March, 1914, and ending on the first day of March, 1916. This lease is under seal and as Kirgan could not write, his name was signed thereto by C. A. Rohrer, his son-in-law. The first count of the declaration charges that on January 1st, 1915, defendant was a tenant under a written lease for one year which was to expire by the terms thereof, on or about March 1, 1915, and that after March 1st, 1915, in consideration that defendant in error would again lease said lands, plaintiff in error promised to construct certain ditches thereon. The evidence fails to sustain this count as it is conclusively shown, that at that time, the defendant in error was in possession of the premises under a written lease which did not expire until March 1st, 1916. In connection with this count, the Court gave to the jury the first instruction offered on behalf of defendant in error which is as follows: "The Court instructs the Jury that if you believe from the evidence that the defendant leased some of his lands orally for one year from March 1, 1915 to March 1, 1916, to the plaintiff; and at the time, in

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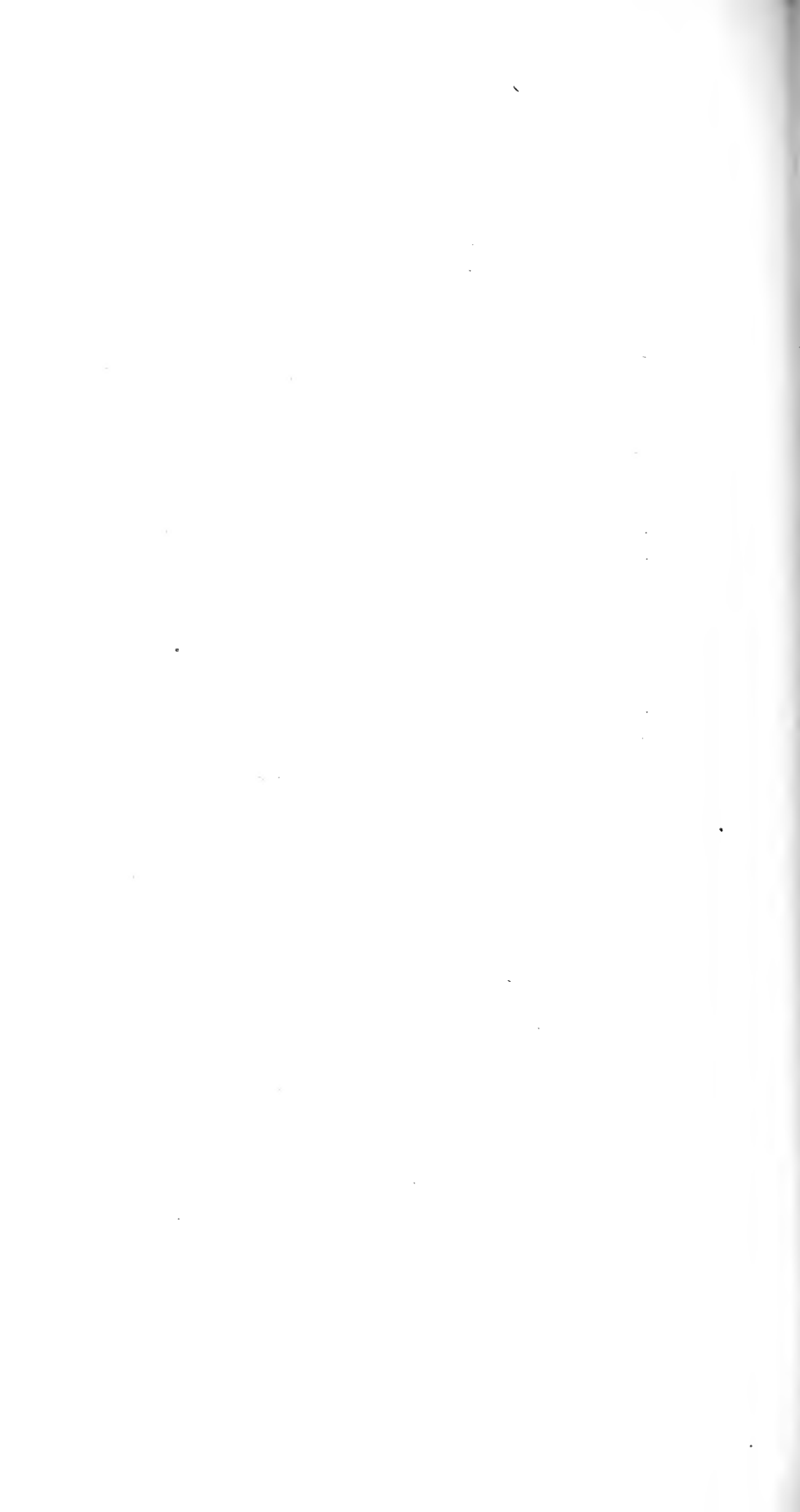
order to induce the plaintiff to lease the same and plant corn thereon on shares, the defendant orally promised the plaintiff and orally agreed that he, the defendant, would in 1915, cut, dig, or open or cause the same to be done, drainage ditches so as to properly drain said land; and the plaintiff relied upon such promise and agreement, and in consideration thereof did lease certain lands of Defendant and did plant and cultivate corn thereon; and if you further believe that the defendant failed to dig or cut such ditches and be-

cause of such failure, water came upon the corn and damaged or destroyed any part of it, then the plaintiff is entitled to recover and your verdict should be for the plaintiff."

The evidence of defendant in error on which this instruction is supposed to be based and which it is claimed sustains the first count is in substance as follows: "It was about the first of March, 1915, that I heard W. D. Fairbanks was going to leave and I went up to see about things. I went to see Mr. Warren C. Fairbanks and told him that the land needed some ditching. He said he was going to ditch the land. He did ditch it, but too late to save my crop. That was all the conversation I had with Mr. Warren C. Fairbanks about it. Afterwards, I saw Mr. Long and he said, 'We expect to ditch it, but they could not get repairs for the machine.' The water damaged my crop in 1915 the latter part of May or June." The court, on its own motion, modified

Page 4

and gave an instruction, No. 14, offered on behalf of plaintiff in error, which is as follows: "11. The Court instructs the Jury that if you believe from the evidence that the plaintiff and the defendant had entered into a written lease beginning on the first day of March 1914, and ending on the first day of March 1916 then the Plaintiff can not recover for damages claimed for the year 1915, **unless you further believe from a preponderance of the evidence that such written lease or agreement was mutually abandoned or rescinded by the parties and that an oral agreement was then entered into for the year 1915, whereby the defendant agreed and promised the plaintiff to open and dig ditches that would properly drain the lands so leased to the plaintiff and that the plaintiff's 1915 crop was injured or destroyed because of the failure of the defendant to dig and open such ditches.**" The italicized (blackfaced) portion is the modification made by the Court. Defendant in error on the trial did not advance nor contend for the theory that the original lease had been abandoned by the parties and a new oral lease for the year commencing March 1st, 1915, and ending March 1st, 1916, substituted therefor, but it is plain that defendant in error proceeded upon the theory that the written lease embraced only the first year from March 1st, 1914, to March 1st, 1915, as he testified, "I had a written lease for the first year." The modification of instruction No. 14



by the court injects into the case for the first time the theory of an abandonment of the original lease on March 1st, 1915. Even if the theory of abandonment had been properly pleaded in the first count, there is no evidence to sustain it. On the 1st of March, 1915, defendant in error was holding possession of the land under a written lease which contained no covenant for the digging of ditches thereon. If plaintiff in error did say that he was going to ditch the land, there was no consideration for the promise, nor do the proofs show that said promise, if made, was made to induce defendant in error to stay on the land. There is no evidence tending to support the first count of the declaration, nor is there any on which to base the 1st instruction given on behalf of defendant in error, nor the 14th offered by plaintiff in error as modified by the Court. The giving of these instructions was clearly erroneous. No recovery can be had under the first count of the declaration.

The testimony of defendant in error which, it is alleged, sustains the second count is in substance as follows: "I rented this land again in 1916. I talked about it before the 1st of March. They had been giving some notices to some of the fellows and I asked Mr. Long whether I got a notice or not. He said, 'I guess not,' and I said I would make arrangements to stay. I spoke about this ditch at the time I talked to him about staying there and he said, 'We are going to cut that ditch just as soon as we get repairs for the ditcher to cut that

Page 6

ditch. That the machine was out of repair and we could not get them yet.' I told him what happened the year before. I told him I could not farm the land any more unless that ditch was dug. He said they would cut the ditch as soon as they got repairs for the machine. They dug the ditch in August, 1916, but my corn was practically lost at the time. The rains came and took it." On March 1st, 1916, W. J. Long had succeeded W. D. Fairbanks as superintendent of The Ranch. Defendant in error does not claim that he had any conversation with plaintiff in error with regard to these ditches or the leasing of the land in the year 1916, but the only conversation he had in regard thereto was with Long. There is no evidence tending to show that Long had any authority to make any leases either oral or written of any of the lands, or to make agreements to dig ditches, and the evidence introduced on behalf of plaintiff in error tends



to prove that he had no such authority. But conceding that Long was authorized to make a lease binding plaintiff in error to dig the ditches in question, at most, his promise was that the ditches would be dug as soon as repairs could be procured for the ditching machine and there is no evidence tending to prove that the ditches were not dug as soon as the repairs for the machine were procured.

Defendant in error retained possession of these lands until January, 1919, and during the years of his tenancy settlements were made

Page 7

each year with plaintiff in error for the rents. It is apparent that, from March 1st, 1914, to March 1st, 1916, he was a tenant holding under the terms of the written lease executed in 1914, and that, from March 1st, 1916, until January, 1919, when he gave up possession, he was a tenant holding from year to year under the terms of the original lease. The evidence does not show that any new lease was made in 1916, and no witness testifies as to the terms of any such lease, but on the contrary, the manifest weight of the evidence is that defendant in error held possession of the land during his tenancy under the terms of the original written lease, and there can be no recovery under the second count of the declaration.

The judgment of the Circuit Court is reversed and the Clerk is directed to embrace in the judgment of this Court the following finding of fact:

The Court finds as an ultimate fact that the plaintiff in error did not promise in manner or form as charged in the declaration.

Page 8



14-226

GENERAL NO. 7150.

AGENDA NO. 17.

APRIL TERM, A. D. 1920.

Tony Stankovich, Appellee,

2191.A. 660

A. Biankini, et al., Appellant.

Appeal from Circuit Court, Christian County.

ELDREDGE, J.

Appellee brought this action in assumpsit against Stephen D. Ratkovich, Valentine Kauzlarich and A. Biankini, appellant, to recover on a note and guaranty thereof. The declaration consists of the common counts and also a special count in which it is alleged in substance that Ratkovich, on March 24, 1916, made his promissory note and delivered the same to Kauzlarich, for the sum of \$850.00, payable to the order of the latter six months after date, with interest at the rate of six per cent per annum, and that said Kauzlarich endorsed and assigned said note to appellee and by virtue thereof guaranteed the payment of the same and that at the time of the execution of said note, appellant, by his written instrument guaranteed to Kauzlarich the payment of said note, which guaranty has been assigned to appellee. Several pleas were filed to the declaration by appellant among which was one of the general issue. The case was heard before the court without a jury who found the issues joined in favor of appellee and entered

Page 1

judgment for \$1,030.00 damages, against all of the defendants.

The entire evidence in the record consists of the note in question, the alleged written guaranty and the testimony of Kauzlarich. The supposed guaranty is as follows:

Chicago, Ill.
12 February 1916.

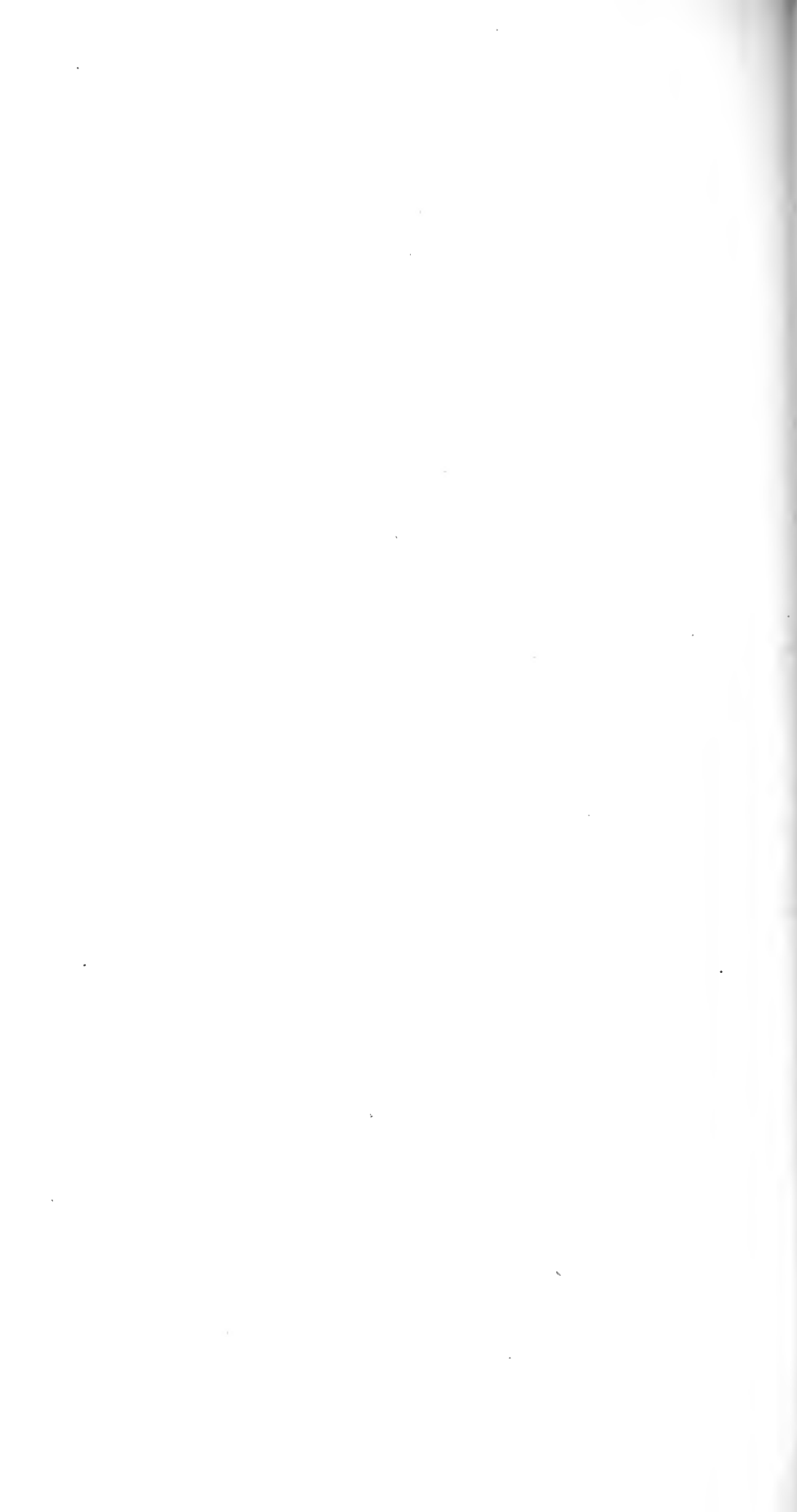
"Mr. Valentine Kauylariac
Perido, Alabama.

Dear Friend:

I was very much surprised to get your letter. Your money lounded will not be lost, which I gaurntee, Mr. Ratkovieth he told me that he took this money off of you for their Company Till he collects money from four (4) other your friends. He goes on Monday to collect this money and we will have to pay you this money the end of this month. So do not get excited or scared for everything shall be all right and he will personally be their, so I pray you that you write me how much you paid for the 80 acres which you bought of the company.

With love to you & wife,

I am yours,
Dr. A. Biankini."



The note, as mentioned heretofore, is endorsed on the back by Kauzlarich. The testimony of Kauzlarich, in substance, is as follows; The signature on the note is that of Ratkvoich and the endorsement thereof on the back is that of himself; that he received a letter from appellant, a translation of which is herein above set forth, and which he received in due course of mail. No other proofs were made or offered.

The letter was written more than a month before the note was

Page 2

executed. No proof was made of any indebtedness existing between Ratkovich and Kauzlarich except that evidenced by the note. The letter does not identify the indebtedness which it is supposed to guarantee and there is no proof that the alleged guaranty applies to the note or the indebtedness sued upon.

For the reasons mentioned and many others which are not necessary to be enumerated, no liability on the part of appellant is proven. Appellant is the only defendant who has appealed and the judgment of the Circuit Court as to him is reversed and the Clerk is directed to embrace in the judgment of this court the following finding of fact:

The appellant, A. Biankini, did not guarantee the payment of the indebtedness sued for.

Page 3

*Certiorari
denied*

GENERAL NO. 7160.

AGENDA NO. 26.

APRIL TERM, A. D. 1920.

Harry Oberman, Administrator of the Estate
of Issac Oberman, Deceased,
Plaintiff in Error.

vs.

219 I.A. 660

Springfield Consolidated Railway Company,
Defendant in Error.

Writ of Error to Circuit Court, Sangamon County.

ELLDREDGE J.

This appeal is from a judgment rendered in a suit brought by Harry Oberman, administrator of the estate of Isaac Oberman, deceased, against the Springfield Consolidated Railway Company to recover damages for the death of the deceased which resulted from a collision between a horse and wagon in which the deceased was riding and a street car operated by the defendant in error. The judgment was rendered upon the verdict of the jury finding that the defendant in error was not guilty of the negligence charged.

The original declaration consisted of one count charging the defendant with general negligence in the operation of the car. Subsequently an additional count was filed charging the defendant with wilful negligence. The plea of general issue was pleaded to both counts.

Isaac Oberman, deceased, was about seventy years of age, and on August 15th, 1918, the day he was injured, was a junk peddler. On the day mentioned he was driving a horse and wagon east on Lawrence Ave.

(Page 1)

nue toward Eighth Street in the City of Springfield. Eighth Street runs north and south and crosses Lawrence Avenue at a right angle. Both streets were paved and a view of the tracks on Eighth Street was unobstructed to the south from a point fifty feet west of the intersection. As the deceased started to drive across Eighth Street, a street car of the defendant was approaching from the south. The horse was old and decrepit, and was walking slowly when it started across Eighth Street. The motorman saw the horse and wagon moving slowly across the street when the street car was a block away and began to sound his gong and slowed down the speed of the car. The deceased constantly kept his head turned toward the north, away from the approaching car and when the latter approached the

horse and wagon and the motorman saw that the deceased apparently did not hear the approaching car he set the brakes on the car and shouted to the deceased. Thereupon the latter looked toward the south, saw the approaching car, whipped the horse with the lines and attempted to make him go faster, and then seemed to get confused and pulled back on the lines and brought the horse to a sudden stop leaving the rear end of the wagon on the track. The efforts of the motorman to wholly stop the car were unavailing, and the car struck the right rear wheel of the wagon and push-

(Page 2)

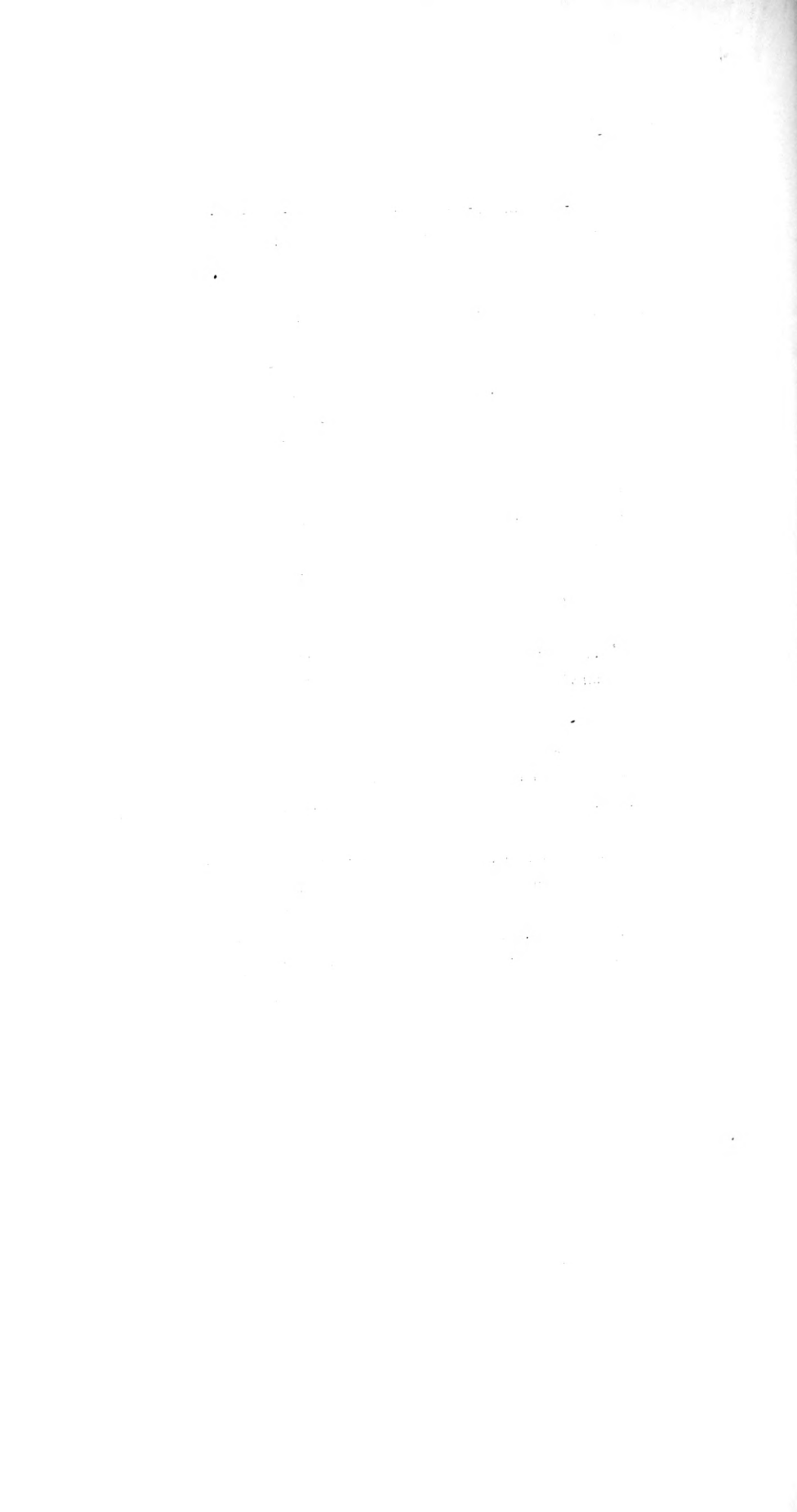
ed it around so that the left rear wheel hit a telephone post and was broken. The deceased fell from the wagon which fall resulted in some bruises and two broken ribs. He subsequently contracted brochial pneumonia from which he died on August 18th.

There was no evidence tending to prove any negligence on the part of the motorman. In fact the testimony of the disinterested witnesses tended to show that he used every reasonable precaution to prevent the accident. The clear weight of the evidence shows that if the deceased had used either his sense of sight or hearing or had not become confused and stopped his wagon suddenly directly in front of the approaching car the accident would not have happened. The verdict of the jury is fully supported by the evidence and a different one could not have been returned.

There was no reversible error in the giving of instructions nor in the admission or exclusion of evidence.

The judgment of the Circuit Court is affirmed.

Page 3



11737a
GENERAL NO. 7167.

AGENDA NO. 32.

APRIL TERM, A. D. 1920.

John S. Sheppard, Appellee,

vs.

Lucy I. Scott, Appellant.

219 I.A. 660

Appeal from Circuit Court Morgan County.

ELDREDGE, J.

This is an action of assumpsit brought in the Circuit Court of Morgan County, and was tried before the court without a jury. Appellee secured a judgment for \$1,000.00 against appellant, to reverse which this appeal is prosecuted.

The declaration consists of the common counts to which the plea of the general issue was filed. Appellee also filed a bill of particulars which discloses that the cause of action is based upon, "An oral agreement between John S. Sheppard and Lucy I. Scott, both of whom are heirs of Joseph J. Sheppard, deceased, whereby said John S. Sheppard agreed to and did forbear to contest the will of Joseph J. Sheppard, deceased, and in consideration thereof the said Lucy I. Scott, the defendant herein, did on or about the 1st day of September, 1916, agree to pay to the plaintiff the sum of \$2,000.00, on which the sum of \$1,000.00 was paid by Lucy I. Scott on or about the seventh of April, 1917. That there remains due and unpaid by the defendant to the plain-

Page 1

tiff the sum of \$1,000.00 together with interest thereon at five per cent per annum from on or about the seventh day of April, 1917."

Joseph J. Sheppard died testate March 2, 1916, leaving surviving him as his heirs five sons, three daughters and one granddaughter, the child of a deceased daughter. These are also the devisees and legatees named in the will. Appellant and appellee are sister and brother and are two of the children of the deceased. The will disposes of about 900 acres of land besides a large amount of personal property.

On the morning of March 7th, 1916, appellant and appellee and all the other heirs proceeded to the office of the Clerk of the County Court where the will was opened and read to them by the Clerk after which all the parties left the court house. In the will appellee and his sister, Emeline R. Paul, were named as co-ex-

ecutors.

The proofs introduced on behalf of appellee tend to show that after he became acquainted with the terms of the will, he became dissatisfied with the bequest and legacy made to him and claimed that his portion of the estate was not of equal value with the portions given to the other heirs; that he told them he would not qualify as executor, but intended to contest the will; that several of his brothers and sisters told him that if he would qualify as executor and not contest the will they would equalize the portions among themselves; that appellant told him that if

Page 2

he would not contest the will, she would see that he got his part and she would give him whatever was right, that she would leave it to a disinterested person to go over it and settle the matter, that she would make up her part—whatever was right, that she would give him \$1,000.00 and if that was not enough she would give him more if he would qualify as executor and not contest the will. Appellee, relying upon these several promises, qualified as executor and entered upon his duties as such. A few weeks thereafter, appellant and appellee, together with their brother, Irvin Sheppard, met at the Ayers National Bank and after a conference, appellant agreed to pay appellee as her share of the equalization of his portion of the estate the sum of \$2,000.00. Later about the last of September, or the first of October, 1916, appellee and appellant again met in the City of Jacksonville and appellant again agreed to pay appellee \$2,000.00 in the following manner, \$1,000.00 to be paid when the first distribution of the estate was made to her and the other \$1,000.00 when the estate was finally settled. Subsequently, on April, 1917, after the partial distribution was made, appellee paid to appellant \$1,000.00, but has refused to pay the balance although the estate has been finally settled. Appellant denied that she ever made any promise to pay anything to appellee but appellee is corroborated in much of his testimony

Page 3

by the testimony of several brothers and sisters and by the further fact that appellant did actually pay to appellee \$1,000.00 when the first partial distribution of the estate was made. Appellant does not deny this payment neither does she attempt to give any explanation of it. The clear weight of the evidence sustains

appellee in his contention.

It is claimed, however, by appellant that it is averred in the bill of particulars that the contract sued upon was made in September, 1916, after appellee had qualified as executor and consequently having accepted the trust of executor he was estopped from contesting the will and there was no consideration for the contract. (Madison vs Larmon, 170 Ill., 65; Dougherty vs Goffney, 239 Ill., 640.) The bill of particulars is not a part of the declaration and its only office is to limit the proofs to the matters set out therein. The bill of particulars in this case is inartificially drawn and may be subject to the above criticism. There is no question but that the real contract was that if appellee would qualify as executor and not contest the will, appellant promised to help equalize his share of the estate by paying a sum to be determined in the future as just and fair. No fixed amount was agreed upon at the time the contract was made but that was left for future consideration and determination. This was evidently the theory

Page 4

on which the case was tried as no objection was made to the evidence of the original contract, and was apparently the view taken by the trial court and we see no sufficient reason for reversing the judgment.

The judgment of the Circuit Court is affirmed.

Page 5

14382
GENERAL NO. 7170

AGENDA NO. 35

APRIL TERM, A. D. 1920

Helen Ayresman, Administratrix of the Estate
of Loren V. Ayresman, deceased, Appellee

vs.

Wabash Railway Company, Appellant

219 I.A. 661

Appeal from Circuit Court, Ford County.

ELDREDGE J.

A judgment for \$12,000.00 was rendered in the Circuit Court of Ford County against appellant and in favor of appellee on a verdict in an action on the case brought under the Federal Employer's Liability Act to recover damages for the death of Loren V. Ayresman, who was employed as a fireman by appellant on an interstate passenger train.

There is very little controversy as to the facts in this case. On October 6th, 1917, Loren V. Ayresman was a locomotive fireman on a passenger train then being operated by appellant from St. Louis Mo., to Chicago Ills., and had been thus employed for a period of four or five weeks. He boarded the engine at Decatur, where the train crews change, at about 1:30 o'clock on the morning of the day in question. T. S. Halted, the engineer, also boarded the engine at that time. The engine was attached to a passenger train which proceeded northerly towards Chicago, its destination. When it had arrived at a point be-

Page 1

tween 17th and 16th Streets in Chicago, it came to a stop because the semaphore signal was thrown against it. At this time, it was proceeding into the City to the depot over a track known as track No. 1 or the northbound track. It arrived at the point where it was stopped by the semaphore at about eight o'clock A. M. On the west side of track No. 1 and paralleling the same is track No. 2 or the southbound track. The distance between the west rail of track No. 1 and the east rail of track No. 2 from 18th Street north to a point north of 17th Street, if extended, is twelve feet and six inches. From the latter point, the tracks commence to curve, but one of them curves at a greater angle than the other so that the distance between them gradually increases until, at the point where the engine on which

219 I.A. 661

the deceased was then fireman came to a stop, the distance between the center of track No. 1 and the center of track No. 2 was about fifteen feet and two inches which would leave a space of ten feet and four inches between the west rail of track No. 1 and the east rail of track No. 2. The engine was equipped with two injectors which had been inspected at Decatur and both were in good working order. These injectors were used for putting water into the boiler of the engine. The train on which Ayresman was fireman was known as train No. 18 and, when it stopped at the semaphore, Ayresman turned on the injector on the left

Page 2

side of the engine and when informed by the engineer that there was sufficient water in the boiler, he shut off the injector, but the boiler check did not seat tightly and allowed steam to escape through the overflow pipe under the cab. It is not contended that there was any defect in the valve check, but that several different things or conditions may cause the valve check to fail to seat tightly after the injector has been used, among which may be the lodgment of a small particle of dirt or other substance on the valve seat. There are several ways of remedying this condition when it happens, among which are tapping the boiler check or the branch pipe with a hard instrument of some kind and also by closing a valve on the injector. The branch pipe may be tapped by the fireman without leaving the engine by opening the cab window and tapping the pipe with a monkey wrench or any other hard implement. To tap the boiler check, however, it is necessary to leave the cab of the engine and proceed to the front end thereof; this may be done either by climbing along a running board attached to the engine or by leaving the engine entirely and walking around to the front and climbing up on the front end. At the time in question, there were two hundred pounds of steam pressure in the boiler and the steam was escaping through the escape pipe with considerable force and in considerable quantity. Ayresman, in order to tap the boiler check, stepped across the gangway between

Page 3

the engine and the tender, picked up his coal pick and jumped from the engine to the ground apparently with the intention of passing to the front of his engine and tapping the boiler check. Just as he jumped to the ground an engine and tender

on track No. 2 passed his engine backing south with the purpose of going to the round-house. As the latter engine came abreast the passenger engine, the escaping steam came up between the two engines in a cloud and after the engine and tender on track No. 2 had passed south some distance, the body of Ayresman was found near the rails of track No. 2 He had been killed instantly. An examination of the engine on track No. 2 immediately thereafter showed blood stains on the rear wheel thereof. The evidence shows that the overhang of each engine was about forty inches so that there was a clear space of about seven feet between the two engines at the place where Ayresman was struck. Nobody saw the engine strike him. The engine going south on track No. 2 had blown its whistle before it had reached the engine on track No. 1 and its bell was ringing all the time. The only conflict in the evidence on any material fact is as to the rate of speed at which the engine on track No. 2 was running. The engineer and fireman of that engine testified that it was not running, at the time in question, over eight or ten miles an hour. Halsted testified that he caught a glimpse of the other engine as it passed his cab through the

Page 4

cloud of smoke and thought it might have been going fifteen miles an hour. A passenger sitting in the rear coach of the passenger train testified that, while he paid no attention to the matter at the time it happened, recalls at the time of the trial that an engine on track No. 2 passed his car at a speed of between eighteen and twenty miles an hour, but the apparent weight of the evidence is that said engine did not pass the rear car of the passenger train, but came to a stop before it reached it.

The case went to the jury upon the issues presented by the second, third, fifth and sixth counts and also an additional count of the declaration filed during the trial. The second count in substance charges that the two tracks were so close together as to make the conditions hazardous to the employees of appellant engaged in their duties and that the deceased, having no knowledge of such condition, it was the duty of appellant to have warned him of such. The third count avers that appellant failed in its duty to provide the deceased with a safe place in which to work because of the closeness of the two tracks to each other. The fifth count charges that the servants of appellant were negligent

in that they ran the engine on track No. 2 backwards at a dangerous rate of speed. The negligence charged in the sixth count is

Page 5

that of the servants running the engine on track No. 2 backwards at a reckless rate of speed through a cloud of steam. The additional count charges general negligence of the servants of appellant in the operation of the engine on track No. 2.

A plat was introduced in evidence by appellant which shows the distances at different points between track No. 1 and track No. 2. To the admission of this plat an objection was made by appellee and overruled and no cross error has been assigned in regard to its admission. It is now claimed by counsel for appellee in their brief that the evidence does not show that the same conditons existed in regard to these tracks at the time of the accident as shown by the plat. During the examination of the witness Cuneen, the following took place: Q. Now, you may state if you made any measurements of these tracks after the death of Mr. Ayresman, along last—along in June of this year, or May. Did you make any measurements there?

A. This gentleman here was down at the garage at the station alooking for me, and he asked me to go over and show him,—

JUDGE CLOUD: (Counsel for appellant) You are claiming there was any change in the location of the tracks from the time of the death?

MR. PHILLIPS: (Counsel for appellee) No. You are not claiming there is either?

JUDGE CLOUD: No, I think they remained about the same.

* * * * *

Q. Now, did you measure the distance between the tracks, the inside

Page 6

rail of track No. 1 and the inside rail of track No. 2?

A. No, sir; I did not measure between that at all. I kind of from the two tracks, I would judge about six or seven feet apart. That is about all I measured.

Q. Now, where Mr. Middleton was with you, did you have a tape there to measure?

A. He asked me to hold a tape-line from where I supposed the body was, and I pointed out as near as I

could where I got the body. * * * * *

Counsel for appellee now insists that this testimony of Cuneen shows that he measured the distance between the inside rails of the two tracks and found it to have been about six or seven feet, and by deducting the forty inches overhang of the passing engine, the proofs show that there was but two or three feet of space between them. Such a conclusion cannot be reasonably drawn from the above testimony. The witness made no measurements himself at all and it is very obscure between what points his companion made measurements. The record also shows that counsel for both parties agreed there had been no change in the position of the tracks since the accident. The plat clearly shows these distances and it cannot be considered a controverted point. There were no grade crossings across the tracks at 18th Street, 17th Street nor 16th Street. Neither 17th Street nor 16th Street extended across the tracks, but ended in a blind wall on the west side thereof. There was

Page 7

a viaduct over the tracks at 18th Street. The accident happened in the daytime at a place where there were no obstructions to the sight, except possibly, the escaping steam from the engine. There was a clear space of between seven and eight feet between the engine on track No. 1 and the passing engine on track No. 2. The location of the tracks did not present a condition that was ordinarily hazardous or that would make it dangerous to any employee of appellant working there under any ordinary conditions and it cannot be held that appellant was guilty of negligence in failing to warn the deceased of the distance between the tracks in question as charged in the second count, nor in failing to furnish the deceased a safe place to work as charged in the third count. The fifth, sixth and additional counts are substantially the same and are all based upon the allegation that the engine on track No. 2 was running backwards at a dangerous or reckless rate of speed. As stated before, there is no controversy over the fact that the bell on the passing engine backing southward was ringing and had been ringing since it left the station; that when the engineer on that engine saw the passenger train on track No. 1 stopped near the semaphore, he blew the whistle on his engine. It is also apparent that the deceased jumped from the cab of his engine to

the ground almost at the instant the eng-

Page 8

ine on track No.

2 passed his engine. It cannot be said as a matter of law that it is negligence *per se* to run an engine backwards on a clear track in a place where no public travel could be expected or where there was any reason to anticipate there might be any employees at work near the track and in broad daylight at a speed of from eight to twenty miles per hour nor could such a rate of speed be reasonably charged as negligence under the particular conditions then and there existing. It is also apparent that the deceased was intent upon getting his pick from the tender and jumped from the cab without looking to see if there was an approaching train on the other track or that he was prevented from seeing it by the escaping steam, but the fact is selfevident that he jumped from the cab at the moment the other engine was passing by. The question presented by this appeal is whether this unfortunate accident was caused by any negligence of appellant. We fail to see wherein the latter was remiss in any duty it owed to the deceased.

The judgment of the Circuit Court is reversed and the Clerk is directed to embrace in the judgment of this Court the following finding of ultimate fact: The Court finds as an ultimate fact that appellant was not guilty of the acts of negligence charged in the declaration.

Page 9

14372

GENERAL NO. 7177.

AGENDA NO. 41.

APRIL TERM, A. D. 1920.

The Cleveland, Cincinnati, Chicago & St. Louis
Railway Company, Appellee,

vs.

2191.A. 661

Joseph H. Weinstein and Ed Walters, doing
business under the firm name of Weinstein &
Walters, Appellants.

Appeal from Circuit Court, Montgomery County.

ELDRIDGE J.

Appellee recovered a judgment in an action of assumpsit in the Circuit Court of Montgomery County for the sum of \$150.00 for the rent of certain premises occupied by appellants under a written lease. The declaration consists of one special count and the common counts and attached to the declaration is a copy of the lease sued upon. Appellants filed three pleas to the declaration to one of which a demurrer was sustained. The trial was had upon the remaining two pleas one of which denied the execution of the instrument and the other was a plea of **nil debet**. No proof was offered to sustain the plea denying the execution of the instrument, but in fact, its execution was admitted. This leaves the only issues to be considered those alleged to have been raised by the plea of **nil debet**. **Nil debet** is not a proper plea in an action of assumpsit, but it is insisted by appellants that it was treated on the trial by both parties

Page 1

as a plea of the general issue or non-assumpsit and therefore must be so treated in this court. The lease provided for a definite term from November 1, 1908, to November 1, 1909, but contained a provision that any holding over beyond the term should constitute a tenancy at will subject in all respects to the terms and conditions therein named, except that either party might terminate such tenancy upon thirty days notice of its intention so to do. The rent stipulated to be paid was \$30.00 per year. At the end of the first year when an agent for appellee went to appellants to collect the rent for the second year, they told him that they would not pay any more rent because the Railroad Company did not own the land because it belonged to the city of Nokomis. Just before this suit was brought, one of the appellants wrote to the

attorneys for appellee stating that he did not owe the rent, "until the Big Four showed they owned the land and if they showed they did own the land, I would pay it." Counsel for appellant have advanced in their briefs a theory that the lease was terminated at the end of the first year on the ground that appellants had abandoned the premises and that, under the terms of the lease, such an abandonment was a termination of the tenancy. The evidence does not sustain this contention and it is apparent that appellants refused to pay the rental for the reason only

Page 2

that they believed appellee did not own the premises, which, of course, is no defense at all even if true as a tenant cannot deny his landlord's title. We can see no merits in the defense interposed to the suit and the judgment of the circuit Court is affirmed.

Page 3

General No. 7187

Ag. No. 20

April Term, A. D. 1920.

Charles F. Douglass, Appellant

vs.

John Chittick, Appellee

2191 A. 661

Appeal from Circuit Court, Cass County

ELDRIDGE J.

Appellant is a real estate agent and brought this action in assumpsit against appellee to recover for services rendered in procuring a purchaser for appellant's farm in accordance with the terms of a certain parol contract. The trial resulted in a verdict for appellee on which judgment was rendered in the Circuit Court.

The declaration is accompanied by an affidavit of amount due. To meet the declaration, appellee filed a plea of the general issue and subsequently, by leave of court, filed an affidavit of merits. Thereupon appellant filed a motion to strike the plea from the files and later amended the motion by including therein a motion for judgment by default. The record shows that the trial proceeded without any disposition of appellant's amended motion. It is now insisted that the trial court erred in not rendering judgment by default because no affidavit of merits was filed at the time the plea was filed. By proceeding to trial without calling the court's attention to the pending amend

Page 1

ed motion and asking to have the same disposed of before the trial, the motion was waived. An affidavit of merits may be filed at any time before default is taken and a court may, in its discretion, extend the time to file the same. Healy vs. Charnley, 79 Ill., 592.

There is very little controversy in regard to the facts in this case. Appellee, on the fourth of July, 1919 owned a farm in Cass County, Illinois, consisting of 120 acres, and on that date met appellant in the village of Virginia and a conversation was had between the parties concerning the selling of appellee's farm. Appellant testified that appellee told him he would sell the farm for \$350.00 per acre net; that he would not pay commissions nor list the land with any real estate agent, but would pay appellant all over that price he could get and that appellee reserved the right to sell the land himself if anyone came to him to purchase the same.

General No. 7187

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April Term, A. D. 1920.

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vs.

John Chittick, Appellee

2191 A. 661

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Appellee testified to substantially the same agreement, but with the addition that he told appellant that, while it was in his mind then to take \$350.00 per acre, he might change his mind at any time. No time limit was fixed for the sale of the land and no conditions of sale were agreed upon by the parties.

Appellant had a man to assist him in his business by the name

Page 2

of Hill and while appellant was absent from home in Missouri, Hill took a man by the name of Miller out to view appellee's farm. Miller was a prospective purchaser of a farm in Cass County and he and Hill and the former's brother-in-law, Neumeyer, arrived at the farm about noon while appellee was eating his dinner. After Hill, Miller and Neumeyer had examined the farm they came back to appellee's house and Hill said to appellee, "I have priced this farm at \$360.00 and I believe it is a sure sale at that price." To this appellee replied, "I have changed my mind, I am out of the notion." Hill then said, "Why is that?" To which appellee replied, "For this reason, for one thing there is an income tax, something like \$25.00 on the land and I have changed my mind about selling it." Nothing more was said or done that day. When appellant returned from Missouri, and had learned from Hill what had taken place between the latter and appellee, he took Miller out to the farm to see appellee and testified that he told appellee that Miller would pay \$360.00 an acre for the farm and that Miller affirmed this in the presence of appellee, but that appellee said he had changed his mind and would not sell the farm. Then Miller told appellee that he would give him \$375.00 per acre provided the latter would put in certain concrete improvements, to which appellee replied that if he should decide to sell the farm on

Page 3

those terms he would call Miller up on the telephone and if he did not do so, the latter would know he had decided not to sell the farm.

Appellee revoked the contract on September 5th, when Hill brought Miller to view the farm. At that time neither Hill nor Miller offered to purchase the farm and no proposition for the purchase of the same was made to appellee. All that was said at that time, before appellee told Hill and Miller that he had changed

his mind, was the statement of Hill to appellee, "I have priced this farm at \$260.00 and I believe it is a sure sale at that price." Immediately after this remark was made, appellee told Hill and Miller that he had changed his mind and would not sell the farm. At this time there was nothing certain that Miller would pay the required price for the farm and he was not then a purchaser who was ready, able and willing to pay for the land on the terms prescribed by the owner. It was said in the case of Lee vs. Moore, 161 Ill. App. 643. "Nothing having been said as to the time and manner of payment, it must be implied in law that the same was to be made in cash at the time of conveyance or at such time or times and upon such terms as were satisfactory to the defendant." At this time, Miller made no proposition to appellee for the purchase of the land whatever and appellee's notification to Hill, who was appellant's

Page 4

agent, of his withdrawal of his offer of the farm for sale was notice also to appellant. The subsequent offer of Miller to purchase the land at \$375.00 per acre, after the revocation of the contract by appellee, imposed no duty upon the latter to accept the same. Moreover, at no time was any offer ever made to appellee by Miller to pay for the farm in cash or upon terms satisfactory to appellee. In addition to what has been said, appellee claims that under his contract with appellant, he reserved the right to change his mind in regard to the price at any time. The jury found its verdict in favor of appellee and necessarily, therefore, found that appellee's version of the contract was correct.

The uncontradicted facts, however, failed to establish any liability upon the part of appellee and the judgment being right upon the merits of the case, the other errors assigned, which are of a technical nature, become immaterial and the judgment of the Circuit Court is therefore affirmed.

Page 5

GENERAL NO. 7189.

AGENDA NO. 50.

APRIL TERM, A. D. 1920.

Roy Stutzman, Appellee,

vs.

Edward Mangan, Appellant.

219 I.A. 661

Appeal from Circuit Court, Ford County.

ELDRIDGE, J.

This suit originated before a Justice of the Peace where appellee recovered a judgment against appellant for \$240.00 for commissions alleged to be due him as a real estate agent for procuring a purchaser for appellant's farm consisting of 120 acres in Ford County. On an appeal by appellant to the Circuit Court of that County, a similar judgment was rendered in favor of appellee. No error is argued in this court except that the verdict is contrary to the evidence which is conflicting on the point whether appellant employed appellee to procure a purchaser for his farm. The court and jury heard the witnesses testify and were in a better position to judge the weight and credit of their testimony than we are. We are of the opinion that the verdict is not contrary to the clear and manifest weight of the evidence and the judgment of the Circuit Court is therefore affirmed.



14-22
GENERAL NO. 7193.

AGENDA NO. 53.

APRIL TERM A. D. 1920

Edwin S. Coombs, Appellant,
vs.

219 A. 662

John Rowland, Appellee.

Appeal from Circuit Court Hancock County.

ELDREDGE, J.

This case originated before a Justice of the Peace. On a trial upon appeal to the Circuit Court of Hancock County, the Court directed the jury to return a verdict in favor of appellee, on which judgment was rendered.

Appellant leased 120 acres to appellee by a written lease which, after providing for the payment of rent on shares, also contains the following: "The said John Rowland is to pay to the said Edwin S. Coombs the sum of \$150.00, payable on the first day of September, A. D. 1918, or before if the said John Rowland should sell his oats crop before September 1st, 1918, for the house barn lts and either the three cornered piece west of the pasture or the pasture land where the said John Rowland pastured last year. This is to be decided by the said Edwin S. Coombs which piece will remain for pasture and which for corn."

Appellant filed a bill of particulars in which he stated that

Page 1

the account sued on was for \$45.00 for rent. While testifying as a witness, he stated that after the lease had been executed he had a conversation with Rowland relative to cropping the said east and west tracts of land and he was asked to tell what was said in that conversation. The Court sustained an objection to the question. Thereupon, his counsel made a statement to the Court that, under the above quoted provision in the lease, appellant indicated to appellee what his election was in regard to the two tracts of land which election did not meet with the approval of appellee, and, thereupon, appellant and appellee made a new agreement relative thereto and that this new agreement is what appellant wanted to prove by the question asked and is the basis of the suit. No offer was made to prove what the witness would testify to in regard to the new agreement and the Court held that the lease, being under seal, its terms could not be varied by a parol agreement. The witness testified further that all the rent provided for by the lease had

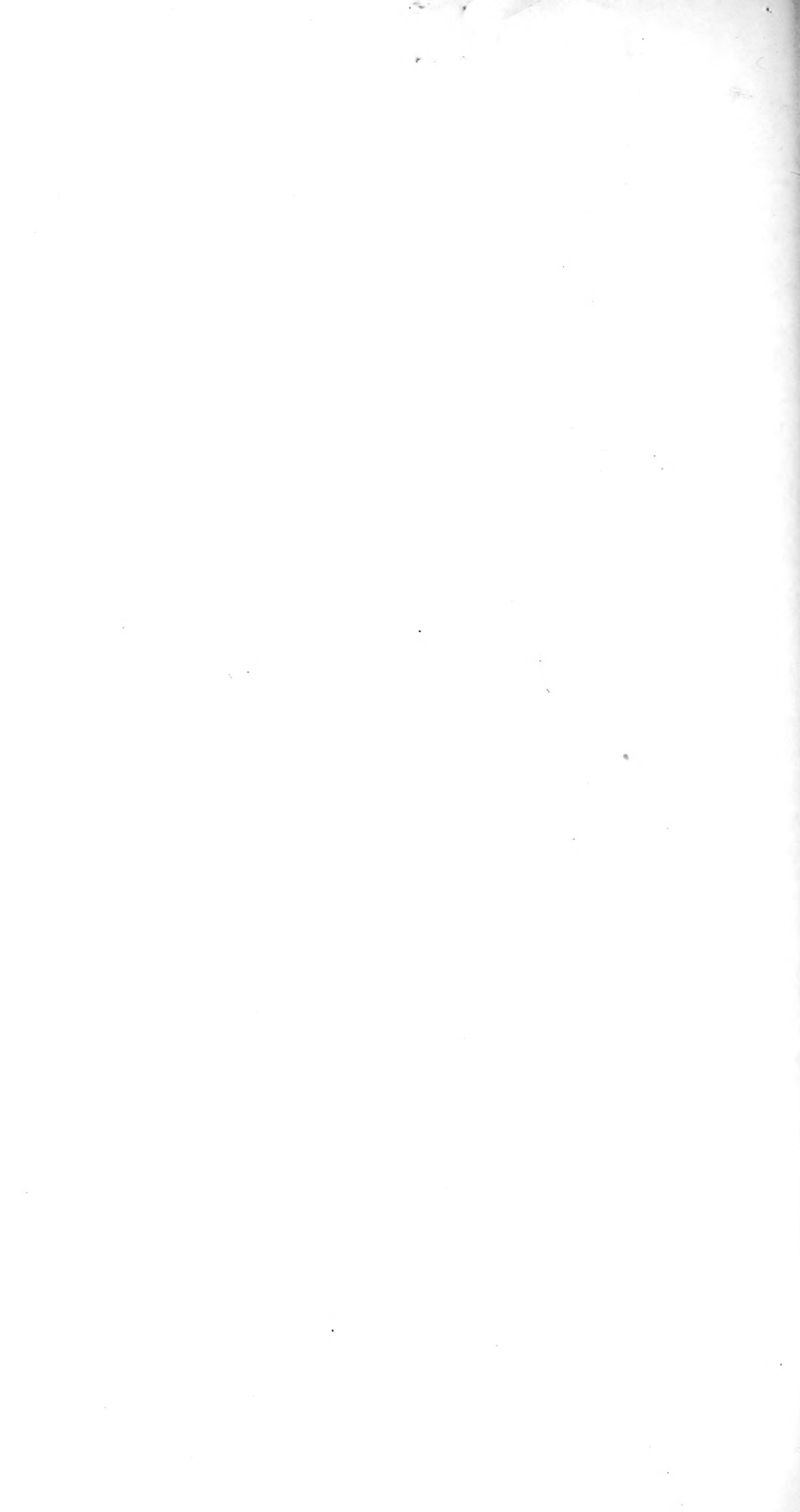
been paid. No further evidence was introduced and the Court directed the jury to return a verdict for appellee. It is now stated by counsel in their brief and argument that what they intended to prove by appellant's testimony was that appellant had elected to have appellee take as a portion of the farm land rented with the buildings the said east tract and that ap-

Page 2

pellee wanted to take the west piece and that finally appellant, in consideration of the agreement of appellee to pay to him the additional sum of \$45.00, agreed to waive and release his right of election and to permit appellee to so take the west piece. The bill of particulars states the claim was for rent, and so far as the Court knew, appellant was seeking to recover more rent than the lease called for by a parol agreement entered into after the execution of the lease, such an agreement being at variance with the terms of the lease which was under seal. The trial court was clearly right in its ruling and, if appellant has any cause of action, it must be based upon an entirely different and separate contract for the consideration for the waiver of a condition in the lease.

The judgment of the Circuit Court is affirmed.

Page 3



GENERAL NO. 7196.

AGENDA NO. 56.

APRIL TERM, A. D. 1920.

Frank M. McGowan, Appellee,

vs.

Alonzo H. Barth, Appellant.

2191.A. 662

Appeal from Circuit Court, Sangamon County.

ELLDREDGE J.

This is an appeal from a judgment in an action of forcible entry and detainer brought by appellee against appellant to recover the possession of a building known as Nos. 216, 218 and 220 South Fourth Street in the city of Springfield, Illinois, on the ground that the lease was forfeited by the use of the premises for gambling purposes by a sub-tenant of appellant. By the terms of the original lease, it expired on the thirty-first day of March, 1917, but by reason of certain option agreements contained therein, it was extended until the thirty-first day of March, 1920, and could have been extended for a period of five years more.

The building is a two story structure and the first floor was used as a garage and display room by the Barth Electric Company and a part of the second floor was used by the same company for storage purposes, but in June, 1919, there were two rooms on the second floor which were unoccupied. At the time mentioned, one Broverman, by consent of

Page 1

appellee, leased the two unoccupied rooms from appellant, and afterwards placed the sign, "Liberty Club" above the door and proceeded to run a gambling establishment therein. When appellee discovered that the rooms were being used for gambling purposes, he declared a forfeiture of the lease and served notice upon appellant to deliver possession of the entire building to him. The proof is ample that the rooms were used for gambling purposes with the knowledge of such use by appellant and two juries have so found.

The judgment is sought to be reversed for the giving of three alleged erroneous instructions. The first instruction complained of is as follows: "The Court instructs the jury that it is a violation of the law of this State for one to permit gambling in any house occupied by him or over which he has control." The criticism of this instruction is that it assumes that the rooms were used for gambling purposes and that appellant knew of



and permit such use. The instruction is but a mere abstract proposition of law and might have been refused on that ground, but taken in connection with the other instructions given, the jury could not have been misled, into the belief that the Court intended to assume therein the facts mentioned as proven. The chief criticism of the second instruction given by the Court is that it directs a

Page 2

verdict without negating an affirmative defense offered by appellant. This affirmative defense is that the rooms were used for gambling purposes with the consent of appellee. There is no evidence to sustain any such defense. While appellee consented that appellant might rent the two rooms, there is no proof of any kind that he consented that they might be used for gambling purposes. A further objection to the instruction is that it omits any reference to the necessity of proof of knowledge by the appellant of the fact that the building was being used for such purposes. The instruction correctly quotes the terms of the covenant breached and at least three other instructions given emphasize the necessity of such knowledge. It is claimed that the fifth given instruction directs a verdict and is subject to the same criticisms as have been made to the second. This instruction does not, in words, direct a verdict, but states that if the jury believes from a preponderance of evidence certain facts to have been proven then it will find that he did permit said rooms to be used for gambling purposes. What we have said in regard to the criticisms of the second instruction applies to the same as made to the fifth instruction.

The instructions as a series fully informed the jury as to the law of the case and they could not have been misled in regard thereto.

Page 3

The giving of the three instructions mentioned does not constitute reversible error and the judgment of the Circuit Court is affirmed.

Page 4

14442

GENERAL NO. 7199.

AGENDA NO. 59.

APRIL TERM, A. D. 1920.

John M. Merrick, Appellant,

vs.

2191.A. 662

Sangamon Loan & Trust Company, Conservator,
Appellee.

Appeal from Circuit Court Sangamon County.

ELDRIDGE J.

This is an appeal from the judgment of the Circuit Court of Sangamon County in overruling objections made by appellant to the allowance of the claim by J. W. Templeman for an attorney's fee in the estate of Bridget Merrick.

The claim was allowed by the Probate Court and also by the Circuit Court. The amount of the claim is \$225.00 and is for services rendered in two litigations. Templeman was employed to resist the application of certain heirs for the appointment of a conservator for Bridget Merrick. The property involved in the conservatorship was between \$25,000.00 and \$30,000.00. The other litigation was a bill in chancery brought by Bridget Merrick against one of her daughters for an accounting and between \$7,000.00 and \$8,000.00 was recovered as assets of her estate. Templeman was associated with another attorney, who also charged \$225.00 for his services, and it is claimed by appellant that the other attorney did most of the work and that

Page 1

Templeman's fee should not be as large for that reason. No evidence was offered that the fees were unreasonable. Nothing appears in the record in this case which shows that Templeman is not entitled to the fees claimed for the services rendered by him and the judgment of the Circuit Court is affirmed.

Page 2

General No. 7103.

Agenda No. 3.

April Term, A. D. 1920.

Charles Woodworth, Appellee,

vs.

William Murray, Appellant.

775a
2191.A. 662

Appeal from the Circuit Court of Champaign County.

GRAVES, J.

The declaration in this case consists of one special count and the common counts. In the special count it is charged that the plaintiff sold and delivered to the defendant \$5,000 worth of corn which amount the defendant agreed to pay the plaintiff on request. The defendant plead the general issue. The case was tried by a jury. A verdict was returned finding the issues for the plaintiff and assessing his damages at \$2,233.88, on which judgment was rendered. In the verdict the jury specified that of the total amount of damages allowed \$42.60 was for interest. No objections have been made to the form of the verdict. The defendant has appealed from that judgment.

It was developed by the evidence on the trial that the plaintiff and one John Bates each owned an undivided one-half of a quantity of corn contained in a certain crib; that it was all sold and delivered to defendant; that there were

Page 1

2904 bushels of good corn and 49 bushels of what the witnesses called rotten corn delivered. So far the facts are undisputed.

If the evidence offered by plaintiff on controverted questions is to be believed, the agreed price to be paid for the good corn was \$1.50 per bushel and the price to be paid for the so-called rotten corn was 50 cents per bushel. J. C. Filer, who acted for the defendant in dealing for the corn when called by the defendant, testified in substance that he examined the corn before it was purchased and agreed to give \$1.50 per bushel for it if it was as good all through as it looked on top and if plaintiff could make it run better, by sorting it, than it then looked on top, he would give him \$1.55 for it.

It is not ordinarily possible, when the issues involve computation to determine from the size of a verdict just what the jury took as a basis for their verdict. It is, however, interesting in this case to note that the account as stated on the theory of the evidence offered by the plaintiff, comes within \$1.03 of the total amount allowed the plaintiff by the jury. From that fact it is at

least inferable that the

Page 2

jury believed the evidence offered by the plaintiff on the disputed issues. It was the province of the jury to weigh the evidence and to determine the credibility of the witnesses, and we find nothing to discredit the conclusion reached by the jury on those questions; on the contrary, a study of all the evidence convinces us that the jury was justified in returning the verdict it did.

The fact that the verdict is for less than the **ad damnum** in the declaration, and the further fact that the interest allowed was greater than the amount of interest due when the declaration was filed, does not create a variance between the averments and the proofs. It is rare that the **ad damnum** is not larger than the amount the plaintiff is entitled to recover. Interest, when it begins to run, is properly computed to the date of the verdict, and is not limited to the time suit was begun or the declaration was filed.

The fact that the proof shows that plaintiff owned half of the corn and that Bates owned the other half does not show a non-joinder, much less a misjoinder, of plaintiffs. The ownership was not joint but several. The plaintiff sold his

Page 3

part of the corn on a different day from the time Bates sold his part. A joint action could not have been maintained by Bates and plaintiff to recover on their separate contracts.

The witness Filer testified to a conversation he claimed took place at a given time and place between himself and the plaintiff. Later the plaintiff called Bates to the stand and undertook to prove by him what Filer had told him at a different time and place about the same conversation. Objection was made and sustained because no foundation had been laid for impeaching Filer in that manner. Plaintiff then asked leave to recall Filer for the purpose of laying the proper foundation by a further cross examination, and the court granted the request. This the defendant insists was error. It was within the sound discretion of the trial court whether such leave would be granted and granting it was not error. It would be a rare state of affairs that would justify refusing such a request.

No reversible error has been pointed out in this record, and the judgment is affirmed.

Judgment Affirmed.

Page 4

General No. 7147

Agenda No. 14

April Term, A. D. 1920.

George D. Corwine, Sr., Trustee, Appellee

vs

Lillie E. Russell, Appellant

219 I.A. 662

Appeal from the circuit court of Logan County.

GRAVES, J.

In 1912 one John B. Martin made a warranty deed conveying to his daughter Lillie E. Russell, then Lillie E. Martin, certain farm lands for life with remainder over to her descendants who should survive her and in case she should leave surviving her no lineal descendants then the remainder to be disposed of under a power of appointment. The grantor reserved to himself a life use of the said premises and provided that the grantee should have possession of the premises during the life of the grantor and fixed the amount that should be paid to him by her as rental therefor. The provisions contained in the deed in that regard being as follows:

"Said Lillie E. Martin shall occupy said land as tenant during the life of the grantor, rendering to grantor a yearly rent of \$600 per annum, payable on the last day of December each year. Grantee, Lillie E. Martin, shall pay the tax on said land each year, retaining the amount so paid out of said sum of \$600 rent."

Appellant Lillie E. Russell, nee Martin, was in possession of the premises so conveyed to her before the deed was

Page 1

made and she or those who acquired right of possession under her as her tenants or assignees or their tenants had possession of the lands so conveyed until this suit was commenced, and she and her husband had made extensive and valuable improvements thereon, farmed the same by themselves or their tenants and paid the taxes thereon each spring for the previous year and deducted the amount so paid from the amount of rental of the premises for the year in which the taxes were paid and which according to the terms of the deed were due on December 31st of each year. In this way the taxes for the year 1914 became due and were paid in the spring of 1915 and the amount so paid was deducted from the rent money that was due on December 31, 1915. Later the life estate of John B. Martin reserved to himself in the deed to his daughter of the premises in question was sold under executions issued on judgments rendered against him for certain security debts,

and was finally conveyed by sheriff's deed dated August 30, 1918, to George D. Corwine, Sr., Trustee. At that time 40 to 45 acres of the land had been leased to and was in the possession of a tenant of appellant, and the balance of it, except where the house stood, had been

Page 2

assigned to the husband of appellant. On December 31, 1918, the husband of appellant tendered to appellee a check for \$485.14, which with \$114.86 that had been paid in the spring of that year for taxes then accruing, made the \$600 which by the terms of the deed was due to the grantor as rent on that day. The check was refused for the assigned reason that the amount was not correct. On January 4, 1919, a demand was made by appellee on appellant for the payment within five days of \$480 and naming the sheriff of Logan County as the person to whom the payment should be made. On January 8, 1919 the full amount stipulated in the deed as rental less the taxes paid during that year was paid to and accepted by the sheriff, who receipted therefor. Later the money so paid to the sheriff was tendered back but was not received, and so far as this record shows is still in the possession of the sheriff of Logan County. The next day this suit in forcible entry and detainer was commenced against appellant alone, charging that the rents provided for in the deed from John B. Martin were not fully paid. A plea of general issue was interposed by appellant. A jury was waived and the court tried the case and found the issues for the plaintiff and that he was entitled to the possession of the premises, and

Page 3

entered not only a judgment for possession and for costs against appellant, but also a money judgment against her for \$491.67, which included \$11.67 for accrued interest. The defendant appeals.

From the facts shown by the record and the argument of counsel for appellee it is apparent that the purposes of bringing this suit was to have the leasehold estate of appellant declared to be forfeited.

Upon no theory can the judgment of the circuit court be sustained. When the five day demand for payment of rent was served on appellant, appellee named \$480 as the amount due and to be paid in order to avoid a forfeiture and named the sheriff of Logan County as the person to whom it should be paid. The record conclusively shows that appellant through her attorney within the time named paid to the sheriff all that was

demand and that the sheriff, acting as the agent of appellee, accepted and receipted therefor. By complying specifically with the terms of appellee's demand, appellant deprived him of any right to declare a forfeiture pursuant to the terms of the demand made.

Counsel for appellee has used considerable space in his brief and argument in discussing what constitutes and what does not

Page 4

constitute a legal tender. There is no question of tender involved in this case, the amount named in the demand, and not a less amount, was actually paid, not tendered, to the person to whom payment was directed.

Appellee claims that the clause above quoted from the deed by which appellant acquired her leasehold interest to the premises in question, should be so construed as to require the tenant to pay the taxes assessed for any year out of the rents due for that year which are payable on the last day of that year. In other words that the taxes assessed for the year 1918 and which are not due and payable or even ascertainable until some time in the early part of 1919, must be paid by the tenant and deducted out of the rent for the year 1918 which is due and must be paid on or before December 31, 1918. The clause in question so construed would be absolutely impossible of performance. So construed it would require the payment by appellant of \$600 rent on December 31, 1918, less some amount incapable of ascertainment which she must pay during the next year for taxes on penalty of being adjudged in default and of having her tenancy terminated because of such default.

Page 5

The clear purpose and intent of the grantor in inserting in his deed the clause in question was to require the payment by appellant of such taxes on the land conveyed as were payable in any year and to deduct the same from the \$600 annual rental due and payable that year, and to pay the balance of such rental when so ascertained on December 31 of that same year. That is the construction placed upon that clause by the parties in interest and the one on which they have acted since the leasehold estate of appellant was created by the deed in question. If any doubt existed as to what construction should be placed on the clause in question, that placed upon it by the parties should govern. **McLean**

Coal Co. v. Bloomington, 234 Ill. 90; **Walker v. I. C. R. R.**
215 Ill. 610-619.

For the reasons given the judgment of the circuit court is reversed with a finding of fact to be incorporated in the judgment of this court, that when this suit was commenced appellant had paid all rent due on the land in question and was not in default in the payment of any part thereof.

Judgment Reversed.

Page 6

certiorari
denied

147a

General No. 7148.

Agenda No. 15.

April Term, A. D. 1920.

George D. Corwine, Sr., Trustee, Appellee,

vs.

Isa Marie Wigginton, Appellant.

219 I.A. 663

Appeal from the Circuit Court of Logan County.

GRAVES, J.

John B. Martin was the father of appellant. He conveyed to her by the name of Isa Marie Martin certain lands. The terms and conditions of the deed are the same as the deed mentioned in Corwine, sr., Trustee v. Russell, (the opinion in which is handed down with this opinion) except the description of the premises conveyed the amount of annual rental and the names of the parties. This suit is an action in forcible entry and detainer, as was **Corwine v. Russell**, supra. The basis of the two suits, the contentions of the parties and the conclusions of the court are the same as in that case. For the reasons given in the opinion in that case the judgment of the circuit court in this case is reversed with a finding of fact to be incorporated in the judgment of this court that when this suit was commenced appellant had paid all rent due on the land in question and was not in default in the payment of any part thereof.

Judgment reversed.

General No. 7171.

Agenda No. 36.

April Term A. D. 1920.

Emner Lee, Appellee,

vs.

J. F. Prather, Appellant.

219 I.A. 663

Appeal from the Circuit Court of Sangamon County.

GRAVES, J.

Appellee had a judgment against one J. T. Hankins in Christian County and there was pending in the circuit court of Sangamon County a bill to compel the application of certain funds in the hands of appellant to the payment of that judgment, when the parties entered into the following stipulation:

"State of Illinois,
Sangamon County,) ss.

In the Circuit Court, March term, 1919.

Emner Lee)
) vs. Bill of Complaint.
T. J. Hankins, et al.,)

STIPULATION.

This agreement made and entered into this 31st day of March, A. D. 1919, by and between Emner Lee, the complainant herein, and J. F. Prather, one of the defendants herein, witnesseth:

Whereas, there are certain matters in controversy between the said parties as set forth in the bill of complaint herein and the answer of the said defendant, J. F. Prather; and whereas the defendant, T. J. Hankins, has prepared a bill of exceptions in the cause in which the judgment referred to in said bill of complaint was rendered in the circuit court of Christian County, Illinois, and intends to sue out a writ of error to reverse said judgment at or during the April term of the Appellate Court, Third District of Illinois, without filing any supersedeas bond therein.

Now, therefore it is understood and agreed in consideration of the mutual settlement and adjustment of the matters in controversy between the said Emner Lee and the said J. F. Prather in this cause, that this cause shall remain undisposed of on the docket of the Circuit Court of Sangamon County, Illinois, without further proceedings, in the event

Page 1

that said cause is taken into said Appellate Court for review at or during the April Term of said court, until said cause is decided by said Appellate Court; and it is agreed that in the event that the judgment of the Circuit Court of Christian County aforesaid is affirmed or judgment rendered therein for any sum against said T. J. Hankins, that the said J. F. Prather will within thirty days from the final decision of the said Appellate Court, pay the amount due to the said Emner Lee on judgment rendered against the said T. J. Hankins, together with all costs and accrued interest thereon; it is further provided that in the event said cause shall be taken for review to the Supreme Court upon writ of *certiorari*, that the said J. F. Prather agrees to pay the said Emner Lee the amount of whatever judgment is affirmed against T. J. Hankins in said Supreme Court within thirty days from the final

decision in said Supreme Court; and it is further agreed that in the event that the said J. F. Prather shall fail to pay all of said sums at the time above agreed upon or in the event that the said T. J. Hankins shall fail and neglect to take said cause into the Appellate Court of Illinois, Third District, for review at or during the April term, A. D. 1919, and J. F. Prather shall fail to pay said sums of money within thirty days after the first day of said term, of said Appellate Court, then and in either of said events, it is stipulated and agreed that there may be entered in this cause a decree under this stipulation requiring the defendant, J. F. Prather, to pay to the said Emner Lee the amount due on said judgment with accrued interest and costs, and that in default of the payment thereof within ten days that execution issue therefor.

It is further agreed that should either the said Appellate or Supreme Court reverse said judgment against said T. J. Hankins, then said J. F. Prather is to be released from the payment of said judgment and this contract shall be null and void.

Witness the hands of the said parties the date aforesaid.

Emner Lee,
J. F. Prather,

Witness to Signature of Emner Lee:
Robert H. Patton.

Witness to Signature of J. F. Prather:
John A. Barber."

Hankins failed to take the cause mentioned in the contract to the Appellate Court for the Third District of Illinois for review at or during the April term of that court for the year 1919 as is provided by the terms of the stipulation,

Page 2

nor until after that term of that court had adjourned to court in course, and appellant failed to pay the moneys specified in the stipulation within the time therein provided. Thereafter appellee by a supplemental bill filed in the circuit court of Sangamon County setting up the stipulation mentioned and the fact that the money was not paid and prayed for the decree therein provided for. The court found the facts to be as above stated and entered a decree in conformity to the terms of the stipulation.

The terms of the stipulation are definite. All facts necessary under the terms of that stipulation to entitle appellee to the decree provided for therein, are proven or admitted to exist. There is no contention that appellant was mentally irresponsible when he signed it nor is any claim made that it was procured by fraud. Neither is any other fact alleged or proven to exist which even tends to excuse the failure on the part of Hankins or appellant to perform the acts necessary to avoid the entering of the decree. The decree of the circuit court is affirmed.

Decree affirmed.

General No. 7182

141272
Agenda No. 45

April Term, A. D. 1920.

William J. Sluder, Appellant

vs.

Edna Sluder, Appellee

Bill for Divorce

219 I.A. 663

Edna Sluder, Appellee

vs.

William J. Sluder, Appellant

Bill for Seperate Maintenance

Appeal from Circuit Court of McLean County

GRAVES, J.

On January 15, 1919, appellee filed her bill of complaint in the circuit court of McLean County charging appellant, her husband, with adultery with one Hazel Lundberg, a divorced woman, and with having deserted her without cause on December 10, 1918, and that she was at the time of filing the bill living separate and apart from appellant without her fault. Appellant answered the bill and denied the charge of adultery and while not denying that he had deserted his wife, attempted to justify his conduct in that respect on the ground that she had been guilty of cruel and "vixinish" conduct on her part toward him.

On January 16, 1919, appellant filed his bill for divorce and therein charged appellee with having been guilty of extreme and repeated cruelty toward him. Appellee answered this bill of

Page 1

appellant's and denied all charges therein of misconduct on her part. The two cases were consolidated and tried together by the court without a jury. The court found the issues in both cases for appellee, dismissed appellant's bill for divorce for want of equity and decreed separate maintenance to appellee on her bill therefor.

The assignment of errors challenges the correctness of the rulings of the court in dismissing appellant's bill for divorce for want of equity and in granting separate maintenance to appellee, but does not in any way challenge the reasonableness of the amount allowed to appellee for her maintenance, if she is entitled to anything.

While the evidence discloses considerable domestic

infelicity between the parties, chiefly dating back to December, 1918, when the Lundberg woman obtained her divorce, and relating chiefly to what appellee seems to have considered appellant's infatuation for that divorcee, and while at times according to the evidence offered by appellant these quarrels culminated in the use of more or less physical force on the part of appellee toward appellant, the proof falls far short of establishing con-

Page 2

duct amounting to extreme and repeated cruelty within the meaning of the statute making such conduct a cause for divorce.

Extreme and repeated cruelty on the part of a wife against her husband is not shown by proof of slight acts of violence on her part, where no permanent injury is inflicted. **Hitchins v. Hitchins**, 140 Ill. 326. Acts of violence on the part of the wife from which the husband can protect himself are not extreme and repeated cruelty within the meaning of the statute of this state warranting the granting of divorce for that cause. **Garrett v. Garrett**, 252 Ill. 318; **Duberstein v. Duberstein**, 171 Ill. 133; **Aurand v. Aurand**, 157 Ill. 321; **Stevens v. Stevens**, 107 Ill. App. 141. Besides that, appellee denies having used the violence charged. The bill for divorce was properly dismissed for want of equity.

The undisputed evidence on the question of right of appellee to a decree for separate maintenance shows that appellant left appellee on December 10, 1918, six days after Mrs. Lundberg, who is named co-respondant, was granted a divorce, and that thereafter he has persistently and consistently refused to return to her or live with her; that since that time he has

Page 3

been frequently in the company of the said Mrs. Lundberg, called on her at her home and went riding with her. The preponderance of the evidence fairly tends to show that appellant told appellee in the presence of the Lundberg woman that she, the Lundberg woman, was his choice, and spoke of how much he admired her, and in speaking of the Lundberg woman when she was not present he said, "I got what I wanted and you can take any meaning you want to," and that "other women are crazier about me than you." There is also proof that he requested appellee to get a divorce from him and told her he would force her to get a divorce; told her to go to his lawyer and sign a paper, and if she refused he would use other means; that

he swore at her and cursed her and charged her with being the cause of the tire of his car leaking and with having joned the car.

Appellant has attempted to justify his conduct toward his wife on the ground that she has been guilty of extreme and repeated cruelty toward him. The proof offered by appellant to justify him in his desertion of his wife was the same as that on which he relied for divorce, and cannot be held to warrant either the desertion of his wife or his other conduct toward her.

Page 4

The evidence in this record warranted the court in finding that appellee was living separate and apart from her husband without her fault and in entering a decree for separate maintenance in her favor. The decree of the circuit court is affirmed.

Decree Affirmed.

Page 5

14502

GENERAL NO. 7190.

AGENDA NO. 51.

April Term, A. D. 1920.

ELMER CARLTON, Appellee,

vs.

AMERICAN EXPRESS COMPANY, Appellant.

219 I.A. 663

APPEAL FROM CIRCUIT COURT OF

CHRISTIAN COUNTY.

GRAVES, J.

This is an appeal from a judgment in favor of appellee and against the appellant for \$217.00 in a suit tried in the Circuit Court on Appeal from a justice of the peace brought to recover for the value of a bull calf that had died of pneumonia which Appellee claims it contracted while in the possession of defendant as a common carrier and bailee for hire. Appellant claims the verdict is manifestly against the weight of the evidence; that there is no evidence tending to show negligence on the part of appellant; that there is no liability on its part as a common carrier for the death of the calf from sickness contracted while in its possession, unless it results from some negligence of the servants of such common carrier; that the court gave improper and refused proper instructions.

The evidence strongly tends to show that the calf then being in good health was shipped on December 19, from Windsor, Illinois to Owaneco, Illinois and arrived and was unloaded at the latter place about 5 o'clock P. M. on December

(Page 1)

20; that it was delivered to Appellee, the consignee, near noon of the following day and was then "running at the nose"; that during all of the time after it was unloaded until it was delivered to the consignee, it remained out-of-doors on the station platform at Owaneco, Illinois with no protection from the elements except, to quote from Appellant's argument, "the agent at Owaneco covered it entirely over with a tarpaulin, with the exception of the end where its head was located"; that "the tarpaulin was not much good; had a good many holes in it"; that the night was cold; that it rained nearly all night; that in the morning the calf was "pretty wet all over" that the rain went right through the tarpaulin; and that it died of pneumonia on January 13 following its delivery to the consignee.

Appellant urges that the evidence fails to show any



negligence on its part that caused the calf to become afflicted with pneumonia, and insists that if any negligence is shown on the part of any one, it was on the part of appellee or his agent in sending the calf by express instead of by freight. Recent experience would tend to convince one that there might be more or less force in that argument, but even if the point be conceded, it is inconceivable how the fact that the shipper

Page 2

used poor judgment in shipping the calf by express rather than by freight would in any way exculpate appellant from liability for loss resulting from the negligence of its agents after the calf had been accepted by appellant for transportation. The liability of appellant arises if at all from its own conduct while the bailment was in its possession and not with the reasons the shipper had for choosing the American Express Company as the conveyor of its property.

Whether the calf contracted pneumonia while in the possession of appellant and if it did, whether its doing so was the result of negligence on the part of the servants of appellant were questions of fact peculiarly within the province of the jury to determine. After a careful study of all the evidence, we are of the opinion that it justifies the verdict. Certainly the verdict is not manifestly not contrary to it. Under that state of facts, we would not be justified in reversing the judgment because the verdict is contrary to the evidence. **Moyer vs. Ill. Central**, 197 Ill. App. 179.

Appellant urges that the trial court erred in its charge to the jury, but it has failed to abstract the series of instructions given and refused. In order to warrant a

Page 3

court of review in passing upon the correctness of the rulings of a trial court in giving and refusing instructions, the entire series of instructions must be presented by the abstract. **The People vs. Weil** 243 Ill. 209; **Thompson vs. The People** 192 Ill. 79. **Strand vs. Schumacher** 187 Ill. 187. A court of review will look to the record to find reasons for affirming a judgment, but will not go beyond an abstract to find reasons for reversing it. Because the instructions in this case are not included in the abstract, we will not consider the criticisms made of them.

For the reasons given, the judgment of the circuit court is affirmed.

Judgment Affirmed.

Page 4

1451a
GENERAL NO. 7194

AGENDA NO. 54

APRIL TERM A. D. 1920

WILLIAM E. GRAHAM, Appellant

vs.

219 I.A. 663

TOWN OF NORTH OKAW, FRED AUFDENKAMP
and ALBERT WHITLEY, Appellees

APPEAL FROM CIRCUIT COURT OF COLES
COUNTY.

GRAVES, J.

There is no principle of law more universally known and understood or more uniformly applied than that the owner of a dominant heritage has the right to have the surface water that naturally falls or accumulates upon the same, pass off therefrom over or on to adjoining serviant premises at the place and in the manner it would have passed or did pass off therefrom in a state of nature unobstructed by any artificial means. This principle is supported by an unbroken line of authorities from **Peck vs. Herrington** 109 Ill. 611 down to the present time. Appellant by apt averments in his bill filed in the Circuit Court of Coles County in this case shows to the court that he is the owner of a dominant heritage upon which surface water naturally comes in large quantities at certain seasons of the year; that between his lands and the lands on and over which such surface water passed from his lands in a state of nature and would still pass but for certain artificial obstructions there existing, there is a public road along which

Page 1

for some 600 feet a concrete retaining wall supporting an embankment has been erected; that this retaining wall and the road bed there, has completely stopped up and obstructed certain natural water courses there existing, when the premises were in a state of nature; that appellees are threatening and are about to extend the said retaining wall and embankment a distance of some 50 feet more without making any opening therein to permit the passage of said water from the premises of appellant and thereby stop up and obstruct still another natural water course over and through which the surface waters that fall or accumulate on the premises of appellant naturally flow therefrom and will thereby be prevented from passing from said premises as the same was wont to do while in a

state of nature. The prayer of the bill is for an injunction restraining the Township of North Okaw, where the land in question is located, Fred Aufdenkamp, the sole Commissioner of Highways of that township and Albert Whiteley and the agents and servants of Aufdenkamp from constructing the additional retaining wall and embankment as threatened without sufficient openings through the same for the passage of water from the premises of appellant. Issue was joined on the averments of the bill and the cause was heard by the Court. The Court found the issues for appellee

Page 2

and dismissed appellant's bill for want of equity. It will not be useful to review the evidence in this record in detail. It is enough to say that the evidence fully establishes the averments of the bill and we find from the evidence the facts to be that the retaining wall and road embankment already constructed, obstruct the flow of surface water from the lands of appellant as it would pass therefrom in a state of nature and that the extension to such retaining wall and road embankment which appellees were threatening to construct and were in fact in the act of constructing when the bill in this case was filed, would if constructed, obstruct still another natural watercourse and still further prevent the passage of surface waters that naturally accumulate on the lands of appellant from passing therefrom as they would in a state of nature to the damage of appellant. The fact that waters that would naturally flow from the lands of appellant through natural channels that have been obstructed by the retaining wall and embankment heretofore constructed are forced around the end of the existing retaining wall and embankment thereby increase the water that would flow there in a state of nature, in no way militates against the right of appellant to have the natural watercourse that the proof shows exists at the point where the proposed extension of the retaining wall and embankment was to be constructed, remain

Page 3

unobstructed.

The decree of the Circuit Court is reversed and the Cause is remanded to that Court with directions to find that the bill of appellant is sustained by the proof and to enter a decree in conformity with the prayer of the bill.

Reviewed and Remanded with Directions.

Page 4

14522
GENL. NO. 7197

AGENDA NO. 57.

APRIL TERM A. D. 1920

ROBERT J. ABELL, Appellee,

vs.

SPRINGFIELD CONSOLIDATED RAILWAY
COMPANY, Appellant.

APPEAL FROM THE CIRCUIT COURT OF
SANGAMON COUNTY.

GRAVES, J.

219 I.A. 664

219 I.A. 664

Appellee recovered a judgment against appellant for \$1,100.00 in a suit in trespass on the case for personal injuries and damages to his automobile in a collision between such automobile and a street car being operated by the servants of appellant. It is urged that the evidence does not show that the collision resulted from any negligence on the part of appellant or its servants but that on the contrary, it does show contributing negligence on the part of appellee. Those questions are peculiarly for the jury to determine, and the findings of a jury on such questions will not be reversed by an appellate court unless the same is manifestly contrary to the evidence. In this case a study of the evidence fails to convince us that the verdict was wrong.

It is next urged that error was committed by the court in permitting appellee to prove the condition of the tracks at and near where the accident happened, because the charge of negligence made against appellant is that it negli-

Page 1

gently operated its car and not that it was negligent in permitting its tracks to be out of repair. The evidence was competent on the question whether appellee was guilty of contributing negligence.

It is next contended that the verdict is excessive. The evidence shows that appellee sustained actual financial loss of a little over \$200.00. He suffered personal injuries on the back of the head that rendered him unconscious for two days and nights and delirious for some three weeks longer. He was incapacitated for any work for five or six weeks and it was sometime longer than that before he resumed his regular employment. He received a serious laceration on the back of his head. His back was left weak and he was at the time of the trial two years after the injury still wearing an artificial

support for it and his back was still weak. While the verdict was substantial, we see no reason for holding it to be excessive. Besides that, the abstract fails to show what the judgment was. Under the rule of this court, as well as all other courts of review, the abstract must show everything relied upon as error. The court will not go to the record to find reasons to reverse a case. This abstract does not show who the judgment was in

Page 2

favor of or against or what amount it was for, if there was one.

Moreover, the rules of this court require an assignment of errors relied on to be written on or attached to the record. This rule was not complied with in this case. There is among the files in this case in the clerk's office a separate sheet of paper on which appears what was probably intended as assignments of error, but it is not and never has been attached to the record. Neither is there any assignment of error written on the record.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.



14321
GENL. NO. 7200.

AGENDA NO. 60.

APRIL TERM A. D. 1920

IN RE THE ESTATE OF BRIDGET MERRICK,

Deceased, JOHN M. MERRICK, Appellant,

vs.

CECILIA A. SCANLAN, Appellee.

219 I.A. 664

APPEAL FROM THE CIRCUIT COURT OF
SANGAMON COUNTY.

GRAVES, J.

Appellee is the executrix of the last will of Bridget Merrick, deceased. As such executrix she filed in the probate court where the estate was being administered her petition asking for leave to sell a certain automobile that belonged to the estate at public auction. The petition was heard and an order entered in which leave to sell the said automobile at public auction to the highest and best bidder, and directing the same to be sold on Wednesday, April 23, 1919 at 2 o'clock, P. M., and that such sale be advertised in the three public newspapers in Springfield once each day for three successive days before said sale. No place for such sale was fixed in the order. The sale was made at public auction at the home of the executrix at the time fixed by the order for \$615.00, to C. E. Whiteherst, he being the highest and best bidder. A report of the sale was made to the probate court and was approved and appellee as such executrix was ordered by

Page 1

the court to deliver the car to the purchaser named in the report of sale. After the sale was approved, appellant John M. Merrick, came into court and filed objections in writing and prayed that the sale be set aside for the sole reason that the consideration for the sale was a grossly inadequate sum and offered if the sale was set aside, he would produce a purchaser for the car for the sum of \$775.00 and would produce a certified check for that amount to make the offer good. The probate court heard the petition and denied the prayer thereof. The case was appealed to the Circuit Court. That court also refused the prayer of the petition.

It appears from the evidence that appellant and appellee are brother and sister and children of Bridget Merrick, deceased, whose estate owned the automobile: that the notice required by the order of court to be

given previous to the sale were not given, but that appellant knew when and where the sale was to be made but refused to go there because of the ill-feeling between him and his sister. It was stipulated at the trial that the automobile was resold by the purchaser at the sale to one C. M. La Bonte and that he was an innocent purchaser for value.

There can be no question that the probate court had

Page 2

jurisdiction to make the order it did for the sale of the automobile and to make the order approving the sale, even if the notices of the sale which were required by the order to be given were not in fact given. Neither can there be any doubt that if the executrix had made the sale without any order, in good faith, and without fraud and such sale had been reported to and approved by the probate court, the purchaser there at would have obtained good title. Jones and Cunningham Practice Vol. 1, Section 245. There is no evidence in this case of fraud or bad faith on the part of appellee, in fact, the written objections filed by appellant do not charge that the sale was tainted by fraud or bad faith. The sale so far as appears from this record was bona fide. That being true, the automobile became the property of the purchaser upon the approval of the sale. Mere inadequacy in price in the absence of fraud will not impeach an executor's sale. **Kimball, Guardian v. Lincoln et. al.** 99 Ill. 578.

"The jurisdiction to order a sale of decedent's property is special and ceases with the order of confirmation, so that thereafter the court granting a license has no power, by virtue of its jurisdiction previously existing, to revise its

Page 3

proceedings, and set the sale aside." 18 Cyc. page 812.

Even if this sale was tainted with fraud in which the purchaser was not implicated, it would only be voidable, and its validity could only be challenged by bill in equity. **Myer v. McDougal** 47 Ill. 278.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

Page 4

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14-5-22

GENL. NO. 7203.

AGENDA NO. 63.

APRIL TERM, A. D. 1920.

HONORA PEMBROKE AS ADMINISTRATRIX
OF THE ESTATE OF JAMES PEMBROKE,
Deceased, Appellee,

vs.

2191.A. 664

MAGGIE E. MARTIN AND DAVID B. MARTIN,
Appellants.

APPEAL FROM THE CIRCUIT COURT OF PIATT
COUNTY.

GRAVES, J.

This is a suit originally begun on a promissory note signed by appellants and payable to James Pembroke, deceased, whose administratrix brings the suit. The declaration was afterwards amended by adding the common counts and an amended fourth count in which it is alleged that the said James Pembroke signed a note as surety for appellants and afterwards paid it, and has not been reimbursed and therefore sues. The defense interposed by the filing of the general issue and notice of special matters in defense, as afterwards amended, was in substance that in September, 1910, appellant, David Martin, contracted with one Richard S. Woodrow for the purchase of some lands in Ohio, and that as a payment on said contract, he gave a note to the said Woodrow for \$1000.00 with James Pembroke as surety; that to secure Pembroke from loss in case he should be compelled to pay that note, appellants gave to him their promissory note, which is the note sued on: that Pembroke paid the note; that the land contract in which the \$1000.00 note, paid by Pembroke, was given, was never consummated but was surrendered on February

Page 1

17, 1911, and a new triplicate contract was entered into between Woodrow, Pembroke and Martin for the purchase of the same lands which was also never carried out, and that afterwards and on May 5, 1911, still another contract was made between Pembroke and Woodrow for the purchase by Pembroke from Woodrow of lands in Michigan wherein the money paid by Pembroke for Martin to Woodrow in the Ohio land deal was treated as a part payment for the Michigan lands, and that thereby the only consideration for the note sued on was extinguished and the note no longer constituted an obligation to pay. The real sub-



stance of the defense as we gather it, was that Woodrow received from Martin, a \$1000.00 note on which Pembroke was surety and from whom he, Woodrow, received payment of principal and some accrued interest which was originally intended to be a part payment for certain lands in Ohio, which were eventually to become the property of Martin, if the contract was carried out. That it was never carried out and that neither Martin nor Pembroke ever received anything for that \$1000.00 until Pembroke got credit for it as part of the consideration for the purchase of the Michigan lands.

If, as a matter of fact, Pembroke did get credit in that manner for the money he paid Woodrow on the \$1000.00 note of appellants, the consideration for the note sued on is gone

Page 2

and the note is not collectable. If the means by which Pembroke secured credit for the money paid Woodrow on the \$1000.00 note on his contract of purchase of the Michigan lands will not square up with rules of law governing novations, no one connected with this litigation except appellants can complain, and they make no complaint. It is therefore manifest that the controlling issue in the case is whether Pembroke did have credit for the money so originally paid by him to Woodrow for appellants. It is no answer to say Woodrow was under no legal obligation to give Pembroke such credit. The question is, did he do it? If he did, then neither Pembroke nor his administratrix have any legal or equitable right to collect the note sued on.

To establish their defense, appellants proved by four witnesses that Pembroke in his life time said in effect that he had received the money paid out for appellants and that appellants did not owe him anything. To further establish that fact, appellant offered in evidence the depositions of Richard S. Woodrow, the person with whom these transactions were had and who of all living persons knows best whether the credit was given Pembroke as claimed by appellants. They also offered the deposition of one Harry J. Nichols who was secretary for Woodrow-Parker

Page 3

Co. for whom Richard S. Woodrow was acting in all of these transactions with appellants and Pembroke. Each of these witnesses testify in their depositions unequivocally that Pembroke did have credit in his Michigan land deal for the money paid by him to Wood-

row for appellants and the interest thereon, to the date the Michigan land deal was consummated. These depositions were excluded by the court from the consideration of the jury. This was clearly error. Counsel for appellee in their argument say these depositions were excluded because the notice of special matters of defense given in connection with the plea of the general issue was not broad enough to include the proof offered. The record does not bear them out in that contention. When these depositions were offered in evidence, counsel for appellee objected for the reason now urged, that the notice of special matters of defense was not broad enough to warrant the admission of the proof. That objection was overruled, whereupon they objected to the evidence because the witnesses were incompetent. That objection was sustained and the testimony of both Woodrow and Nichols was excluded from the consideration of the jury. If the evidence was incompetent upon either theory, it was not error to exclude it regardless of the reason the court gave for doing so, but if it was competent for any reason or upon any theory, it

Page 4

was error to refuse to admit it.

The gist of the notice of special matters of defense is that the note sued on was given to secure Pembroke from loss if he should be required to pay the \$1000.00 note given by appellant to Woodrow on which he was security: that while he did pay it he was afterwards reimbursed for all he so paid out, in a series of land deals which culminated in the purchase by him of the Michigan land on the payment for which the moneys paid to Woodrow by him for Martin was applied. The depositions of both Woodrow and Nichols tended to prove exactly the state of facts set up in the notice and they should have been read to the jury unless some other sufficient reason is found for excluding them besides the insufficiency of the notice.

The objection that these witnesses were interested and therefore incompetent, is based on the provisions of Section 2 of Chapter 51 R. S. known as the Evidence Act. Section 1 of that act provides "that no person shall be disqualified as a witness in any civil action suit or proceeding, except as herein after stated, by reason of his or her interest in the event thereof, as a party or otherwise * * *" Section 2 provides that "no party to a civil action suit or proceeding or person directly interested in

the event thereof shall be allowed to testify therein, of his own motion, or in his own behalf, by virtue of

Page 5

the foregoing section, when any adverse party sues or defends * * * as the executor, administrator, heir, legatee, or devisee of any deceased person, * * * unless where called as a witness by such adverse party * * *".

The interest that will disqualify a person as a witness under the foregoing sections must be a legal interest in the outcome of the suit and must be certain, direct and immediate. **Ackman v. Potter** 239 Ill. 578. **Stephens v. Hoffman** 263 Ill. 197. The test is whether the witness will immediately gain or lose by the event of the suit or whether the verdict can be given in evidence either for or against him in another suit. **Jones v. Abbott** 235 Ill. 220, **Feitl v. Chicago City Ry. Co.** 211 Ill. 279, **Bellman v. Epstein** 279 Ill. 34, **Wetzel v. Firebaugh** 251 Ill. 190. Neither Woodrow or Nichols are shown to have had any interest in the result of this suit either directly or remotely. Appellee has evolved a theory that in some way a contract of novation is involved to which appellants, Pembroke and Woodrow-Parker Co., are parties and because both Woodrow and Nichols are stock owners in that corporation, therefore, they are interested in the event of this suit and disqualified. There is nothing in this record that even remotely tends to show a contract of novation. The exclusion of the evidence of these two witnesses because of interest was error.

Page 6

Exhibit "C" offered by appellant was properly excluded so far as appears from anything in the abstract of evidence in this case. There was no proper foundation laid for its admission.

Evidence was offered by appellee tending to show that Pembroke was drunk when he made the Michigan land deal and that some year or so thereafter, he was mentally unfit to do business. There is no issue in this case to which that evidence was pertinent. It is of a character that would tend to prejudice the jury and should not have been admitted.

Plaintiff exhibits 5, 8, 9, 10, 11 and 12 were admitted over objection of appellants. Exhibit 5 is a letter purporting to have been written by one Frank Hetishec as Vice President of the First National Bank of Monticello, Illinois, to David Pembroke in relation to a note of \$1000.00 purporting to be signed by appellants.

Exhibit 8 is a note dated February 17, 1911, payable

to the order of Richard S. Woodrow for \$450.00 and signed James Pembroke.

Exhibit 9 is a note dated March 1, 1912, payable to Woodrow-Parker Co. for \$1247.20 with no signature.

Exhibit 10 is a check on First National Bank of Monticello, Illinois for \$3500.00 apparently given for a draft

Page 7

payable to Woodrow.

Exhibit 11 is a note dated February 26, 191- for \$3500.00 payable to Richard S. Woodrow and signed James Pembroke and Honora Pembroke.

Exhibit 12 is a note for \$1000.00 payable to Woodrow but is without signature.

None of these exhibits seem to have the remotest connection with the issues in this case and appellee has not undertaken to show how, if at all, they were admissible. From the light given us in the record as abstracted and the briefs of appellee, we are not able to see upon what theory any of them are competent.

By the first instruction given at appellee's request, the Court undertakes to tell the jury how a promissory note may be discharged. It deals with the question of payment in case of a promissory note given in the regular way for value received and also where the note is given as accommodation. Also with the effect of intentional cancellation of the note by the holder and of the effect of the maker becoming the owner of it, but it does not advise the jury as to the law when the consideration for the giving of the note fails as the evidence shows was the

Page 8

facts in this case. It was erroneous and misleading.

The third instruction given for appellee directs the jury to consider the mental condition of Pembroke at the time the transactions involved in this case were had. There was no issue in this case requiring the jury to determine whether Pembroke was sane or insane. Instructions on that subject should not have been given.

The fifth instruction told the jury the First National Bank of Monticello, Illinois had authority to receive payment of the note in question and cancel and surrender the same when paid.

That question was in no way involved in this case and the instruction could only tend to raise false issues and confuse the jury. It was improperly given.

The seventh and eighth instruction given at the request of appellants were modified so as to direct the jury that if the facts were found to be that Pembroke

was not repaid in full for the money he paid to Woodrow for Martin, then his mental condition was proper to be considered in determining the case. These modifications rendered these instructions erroneous.

For the reasons given, the judgment of the Circuit Court is reversed and the cause remanded to that court for a new trial.

Reversed and Remanded.

Page 9

10-27-20
GENERAL NO. 7210

4302
AGENDA NO. 66

APRIL TERM, A. D. 1920.

NORA STEWART, Appellee

vs.

ALEXANDER SUPPLY CO., Appellant

219 I.A. 664

APPEAL FROM THE CIRCUIT COURT OF COLES
COUNTY

GRAVES, J.

The parties to this suit on June 18, 1919 entered into a contract in writing whereby appellee was employed by appellant as its general agent whose duties were "to select and employ suitable salesmen and other general agents for the sale of merchandise" for appellant for the period of eight weeks.

The proof shows and it is not denied that appellee worked for appellant for full eight weeks under the contract and performed all of her duties thereunder; that in so doing, her legitimate expenses were \$102.58; that the orders received by appellant for goods sold during that time by agents appointed by appellee amounted to \$584.75; that during that time she retained \$45.50 of the money received from agents for their outfits as it was provided in the contract she should do, and that when she went to work for appellant, appellee deposited with it \$25.00, for what purpose does not appear.

When the services had been completed, a difference arose between the parties as to how much was due appellee under

Page 1

the contract. Appellee claims she was entitled to \$120.00 salary for eight weeks as \$15.00 per week; \$102.58 for expenses, \$46.78 commissions on goods purchased by the agents appointed by her, being 8 per cent on \$584.75, and the return of the \$25.00 deposited with appellant in the beginning, or \$294.36 in all, and gave it credit on that amount for \$45.50 which she had retained from the amounts collected by her from agents appointed by her, leaving a balance due her of \$248.86. Appellant in its brief admits it owes her a total of \$117.28 made up of the \$25.00 deposited by her with it when she commenced work under the contract, \$46.78 being 8 per cent on \$584.75, the amount of goods purchased by agents appointed by her after their appointment, and \$45.50 which it claims she was to have as a commission on moneys received by her for outfits sold by her to agents

when they were appointed, but denies that it ever contracted to pay appellee anything for salary and expenses, aside from the commissions she became entitled to out of moneys received from the sales of outfits to agents, and on goods purchased by agents after their appointment.

Appellee brought this suit in Justice Court to recover what she construes is coming to her from appellant. It

Page 2

was tried in the Circuit Court on appeal from the Justice of the Peace. The jury returned a verdict in favor of appellee for \$247.58. The amount of this verdict is just fifty cents less than the sum of eight weeks salary at \$15.00 per week or \$120.00, the expense money paid out by appellee \$102.58, and \$45.50 the amount retained by appellee from the moneys received by her from agents for outfits sold by her. Appellee filed a remittitur of \$45.50, the amount retained by her out of the moneys collected by her from agents appointed by her, and judgment was entered in her favor for \$202.08.

Appellant in its brief says the construction of this contract, as to what compensation appellee was to receive, is the only question in the case. On that subject the contract provides as follows:

"IN CONSIDERATION of the foregoing agreement of second party being faithfully and diligently performed as first party directs, the first party agrees to pay the second party, in the manner above provided, and as hereinafter stipulated, for her services as follows, to wit: Fifteen Dollars per week and necessary traveling expenses including railroad fare, hotel bills, postage, advertising and other legitimate traveling expenses, and to supply second party from time to time with a stock of outfits which are necessary in conducting his services as General Agent."

The foregoing quotation is a complete separate paragraph of the contract. It is clear and unequivocal and needs no construction. Unless it is varied by some other part of

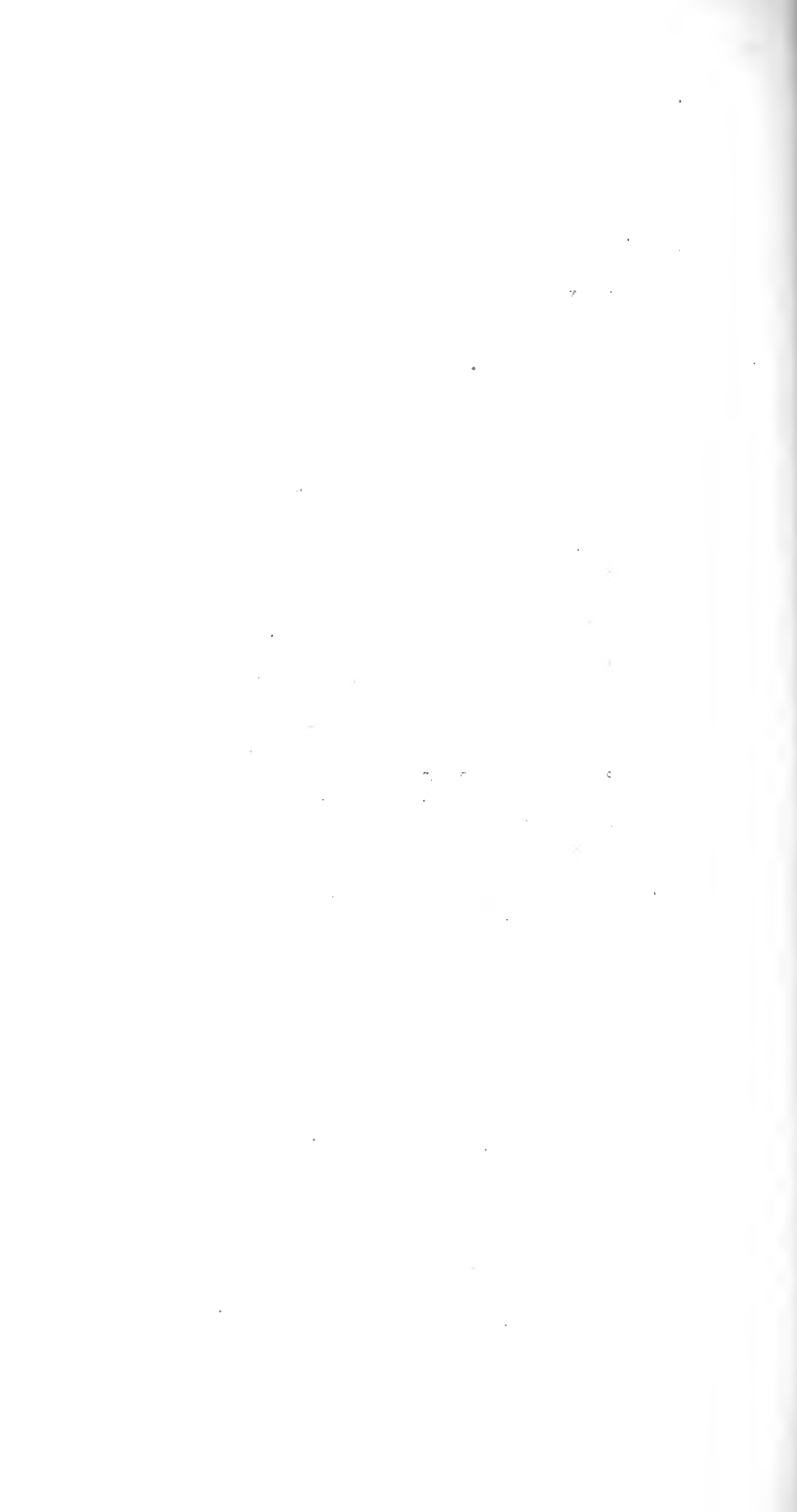
Page 3

the contract, it clearly means that appellee is to receive a salary of \$15.00 per week and her expenses.

The contract further provides as follows:

"It is mutually agreed that the salary of the second party shall not exceed fifteen dollars per week and necessary traveling expenses as above set forth, and that upon fulfillment of this contract that he be paid an amount equal to a commission of 8 per cent of the money received, during the life of this contract, for orders from salesmen he has appointed."

This clause recognizes and affirms the contract to be one for services of appellant on a salary which it is



not to exceed fifteen dollars per week. It also shows the contract to be that she shall have besides her salary, her necessary traveling expenses "as above set forth" and it is above set forth in the first quotation above, that such expenses shall include "railroad fare, hotel bills, postage, advertising and all other legitimate traveling expenses." The last quoted clause of the contract varies the first clause quoted by stipulating for an allowance to appellee for her services to be **paid to her** upon the fulfillment of her contract of an additional amount equal to 8 per cent of all moneys received by appellant during the life of the contract for orders of goods sent in by the salesmen or agents appointed by appellee.

Page 4

It is further stipulated in the contract as follows:

"It is further agreed that on the fulfillment of this contract, that if there be any final shortage between the collections retained, and the salary and expenses above stipulated, that this shortage be paid to the second party out of the fund created by the surplus remittances with the second party's weekly reports and 8 per cent commission on the total volume of cash received for orders from all salesmen second party has appointed."

This clause also recognizes the contract to be for the payment of a **salary** and all expenses, by appellant to appellee and provides that the same shall be paid "out of the fund created by the surplus remittances with the second party's weekly reports and 8 per cent commissions on the total volume of cash received for orders from all salesmen second party has appointed." The part of the last quoted clause of the contract referring to the payment of any shortage in appellee's salary and expense account, out of some "fund" is senseless and incapable of being construed into an enforceable stipulation. There is no fund provided for elsewhere in the contract to be created in any way or by any person. It amounts to saying, if at the end of the term of service by appellee she shall not have been paid her full salary and expenses, the deficit shall be paid by appellant out of moneys it never had, and as to the reference in the latter part of that stipulation to paying the deficit out of the 8 per cent commissions on cash received by

Page 5

appellant from agents appointed by appellee, it amounts to saying that if appellee at the end of the term of service has not been paid her full salary and expenses she shall pay herself out of her own money, for the clause of the contract previously quoted provides she shall have that 8 per cent. of such moneys as her commission.

This contract was prepared by appellant and by a familiar rule must be most strongly construed against it. This contract should be construed to mean that appellant will pay appellee in all events fifteen dollars per week for eight weeks, and pay all of her legitimate traveling expenses. Whatever there is in that contract that is inconsistent with that construction was evidently placed there to deceive the unwary, and should not be recognized in the construction of this contract.

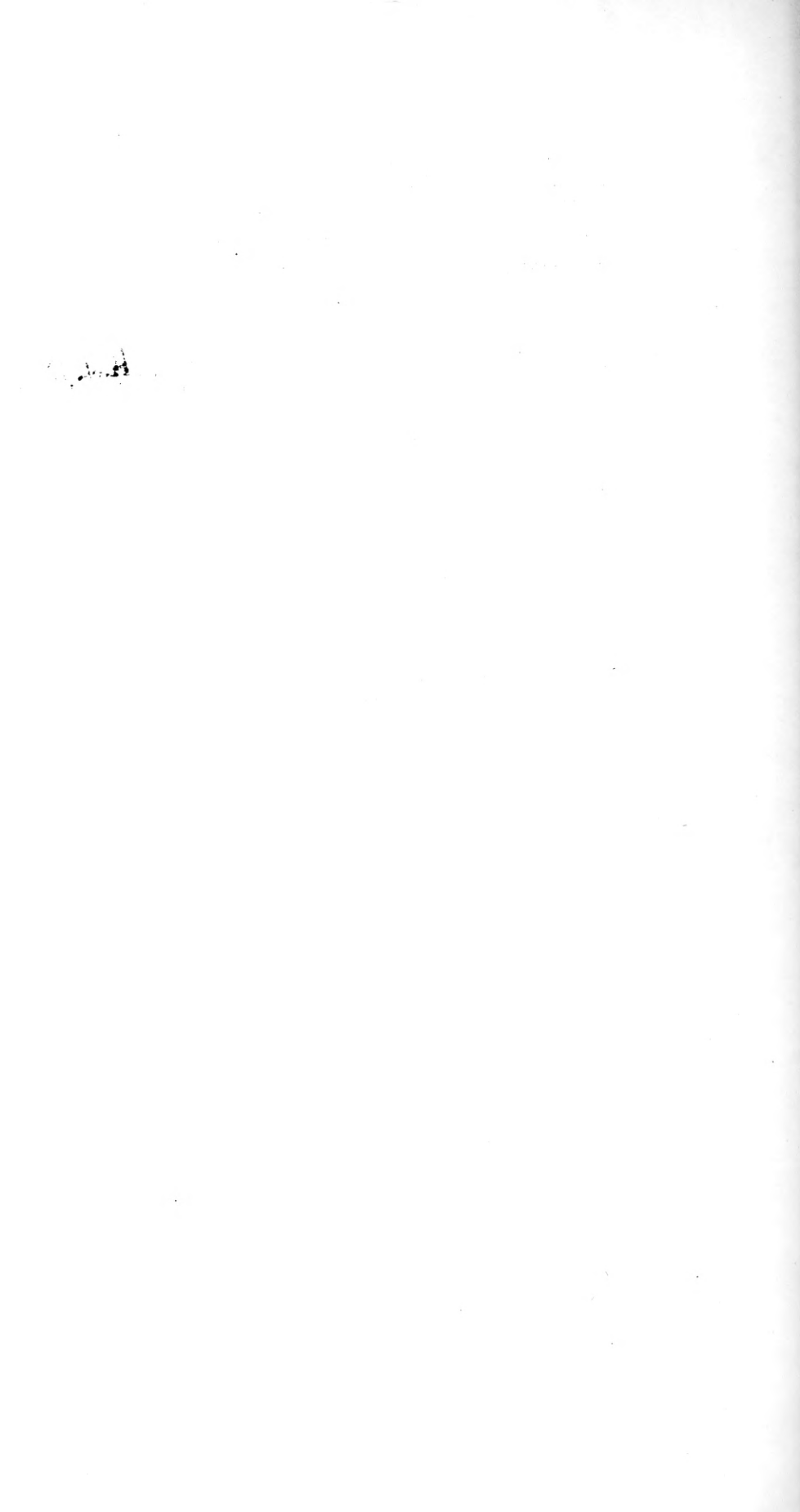
As we view this record, it shows that appellee was entitled to recover of appellant \$120.00 for 8 weeks services at \$15.00 per week, \$102.58 for money necessarily expended by her, \$46.78 for 8 per cent. commissions on \$584.75 received by appellant for goods sold to agents appointed by appellant and \$25.00 for moneys deposited by appellee with appellant and not shown to have been returned, a total of \$248.86, less \$45.50 being the amount that by the contract she was authorized to retain and did

Page 6

retain out of moneys received by her from agents appointed by her for outfits sold to them. The judgment was for \$202.08 or \$2.36 less than was her due, but as no cross errors have been assigned, all this Court can do is to affirm this judgment, which is done.

Judgment is Affirmed.

Page 7



General No. 6932

Agenda No. 2

October Term, A. D. 1918

Mary A. Adkins, Administratrix of the Estate
of Joshua D. Adkins, Deceased, Appellee

vs.

State Bank of Springfield, et als, Appellants

Appeal from Circuit Court of Sangamon County

219 I.A. 664

PER CURIAM.

Joshua D. Adkins, now deceased, filed a bill in equity against the appellants, State Bank of Springfield, Herman Peirik, S. H. Cummins and Joseph F. Bunn, to enjoin the collection of a judgment that had been rendered against him, by confession on a warrant of attorney, for \$1314.00. A temporary injunction was granted. Appellants interposed a motion to dissolve such injunction on the ground that no equity appeared on the face of the bill. The motion was denied. After the case was brought to this court Joshua D. Adkins died intestate. Mary A. Adkins was appointed administratrix of his estate, and was substituted as appellee.

Page 1

On August 20, 1917, Josuha D. Adkins signed a judgment note for \$1250.00, due ninety days after date, payable to S. H. Cummins. The bill alleges that S. H. Cummins represented to Josuha D. Adkins he had a lease on a zinc mine at Joplin, Missouri; that it was valuable; that he wanted to raise funds with which to operate it; that he was worth \$75,000.00, and could not afford to make false statements about the property; that if Josuha D. Adkins would give him his note for \$1250.00 he would never be called upon to pay it as he (Cummins) would each week, out of proceeds from the mine, credit the note with sufficient amounts to pay the same within ninety days; that he (Cummins) would not sell or assign the note, but would hold it; that in order to accomodate S. H. Cummins, without any consideration, Joshua D. Adkins executed and delivered the note; that the agreement was that the note was to be used as collateral, for a short time, at a bank in Springfield, Illinois.

The bill further charges that the foregoing statement and representations were false and fraudulent; that on November 19, 1917, Joshua D. Adkins came to Springfield,

Page 2

learned the note was held by Herman Pierik, to

whom he told the foregoing facts, and was told by Herman Pierik that he only held the note as collateral security for \$300.00; that Herman Pierik knew S. H. Cummins had obtained the note by false and fraudulent representations; that on November 22, 1917, Herman Pierik took judgment, by confession, on the note in the circuit court of Sangamon county for \$1283.73, and an execution was issued thereon.

The bill further alleges that on November 28, 1917, Joshua D. Adkins filed a motion to vacate the judgment and to be permitted to defend. The motion was allowed. On April 18, 1918, Herman Pierik dismissed the suit, was given leave to withdraw the note, and on the same day another judgment was taken by confession on it in the circuit court of Sangamon county by appellant, State Bank of Springfield.

The bill further alleges that the dismissal of the suit by Herman Pierik, was part of the fraudulent scheme and conspiracy between him and the defendant S. H. Cummins to cheat and defraud Joshua D. Adkins; that appellant, State Bank of Springfield, paid nothing for the note, but took it merely to aid Herman Pierik and S. H. Cummins in their fraud-

Page 3

ulent attempt to collect it; that appellant, State Bank of Springfield, knew of the false representations made by S. H. Cummins at the time it obtained the note and took judgment on it.

The bill prays the surrender and cancellation of the note; the abatement of the suit at law; the vacation of the judgment; that the transfer of the note be enjoined; that S. H. Cummins be subrogated to the liability and obligation in reference thereto of Joshua D. Adkins; that all the defendants be enjoined from prosecuting or collecting the judgment at law.

The motion to dissolve the temporary injunction, for want of equity, had the same effect as a demurrer to the bill (Field v. Village of Western Springs, 181 Ill. 186, 190) and we must treat the allegations therein contained as being true.

It is insisted by appellant, State Bank of Springfield, that the court erred in over-ruling the demurrer to the bill for the reason that appellee has a remedy at law. If it be true that appellee has a remedy at law that fact would not prevent her from maintaining this bill if the facts therein alleged are true.

In the case of Foot v. Despain, 87 Ill. 28, 30, the court said: "It, however, is urged complainant has a remedy at law by motion to set aside the judgment and upon this ground a court of equity will not grant relief. This case arose in Nelson v. Rockwell, 14 Ill. 374, and it was there said: "Fraud is one of the broadest grounds of equity recognized by the courts, and relief may be obtained against a judgment at law, although the party might find a remedy in the court of law. It is the fraud which gives jurisdiction to this court, and the aggrieved party is not obliged to resort to another tribunal possessed of less power and appliance to ascertain the truth and grant the requisite remedy, although the other tribunal may have jurisdiction."

The Chancellor did not err in denying the motion to dissolve the temporary injunction that has been issued in this case and the order made in reference thereto must be affirmed.

Decree Affirmed.



(14572)

General No. 7166.

Agenda. No. 31.

April Term, A. D. 1920.

Guy E. Rook, Appellee,

vs.

219 I.A. 665

Walker D. Hines, Director General of Railroads.

Appellant.

Appeal from the Circuit Court of Morgan County.

Per curiam.

The judgment rendered in the circuit court is reversed and this cause remanded for a new trial for the reasons assigned in the opinion filed in No. 7165, Harry D. Clark v. Walker D. Hines, Director General of Railroads, a case involving the same questions of law and of fact that are involved in this case.

Reversed and remanded.



